No. 88-1682

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED BUILDERS, INC.,
Petitioner,

v.

CLARENCE MEIGGS, *et al.*,
Respondents.

FAITH CONSTRUCTION COMPANY,
Petitioner,

v.

TERRY FRAZIER, *et al.*,
Respondents.

KBR CORPORATION,
Petitioner,

v.

HARRY HOBBS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

In *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984), this Court definitively construed the meaning of statutory language in a nationally-applicable federal law which had been incorporated in a local District of Columbia law. In the present cases, the District of Columbia Court of Appeals has expressly refused to follow this Court's construction of that statutory language and has held the language to have the *opposite meaning* from that determined by this Court. That court has furthermore declared that it—not this Court—is the "final arbiter" of all local D.C. laws and that this Court has no jurisdiction to review and overturn the D.C. Court of Appeals' construction of such laws. The questions presented are:

1. Does this Court's certiorari jurisdiction under 28 U.S.C. § 1257 include claims made under statutes that apply only within the District of Columbia?

2. May the D.C. Court of Appeals refuse to follow this Court's definitive construction of a local D.C. law?

3. May the D.C. Court of Appeals reject this Court's construction of federal provisions adopted in a D.C. law in the absence of an affirmative indication that the Congress or the D.C. Council intended those provisions to have a meaning different from that determined by this Court?

4. Has the D.C. Court of Appeals' decision subverted the prerogative of the Congress and the D.C. Council to make laws for the District of Columbia?

LIST OF PARTIES

Clarence Meiggs and Carolyn Meiggs were appellants in No. 85-577 before the District of Columbia Court of Appeals. Terry Frazier and Delores Frazier were appellants in No. 86-257. Harry Hobbs and Shirley Hobbs were appellees in No. 86-185, but after consolidation of the cases were arbitrarily considered to be *amici curiae* in support of appellants in Nos. 85-577 and 86-257.*

Associated Builders, Inc. was appellee in No. 85-577. Faith Construction Co. was appellee in No. 86-257. KBR Corporation was appellant in No. 86-185, but after consolidation was considered to be *amicus curiae* in support of appellees in Nos. 85-577 and 86-257. *See* n.*.

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* In its May 1, 1986 Order consolidating the cases, the Court of Appeals "[ordered] that the appeals in Nos. 85-577 and 86-257 be consolidated," that the parties in No. 86-185 would "be bound by the decision of the court with respect to the consolidated appeals," and that all parties would have full appeal rights with respect to the court's decision. Order at 2 (May 1, 1986).

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Associated Builders, Inc., Faith Construction Company, and KBR Corporation petition for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in these consolidated cases.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 545 A.2d 631 and is reprinted in the appendix hereto ("App.") at 1a-17a. The orders and memorandum opinion of the Superior Court of the District of Columbia are unreported and are reprinted at App. 18a-19a, 20a-22a, and 23a-31a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1988. App. 32a-34a. That court's order denying a petition for rehearing and petition for rehearing *en banc* was entered on January 18, 1989. App. 37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).[1] The judgment of the Court of Appeals is "final" within the meaning of 28 U.S.C. § 1257. *See, e.g., Goodyear Atomic Corp. v. Miller*, 108 S. Ct. 1704, 1708-09 (1988); *Mitchell v. Forsyth*, 472 U.S. 511, 525 & n.8 (1985); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 557-58 (1963).

RELEVANT STATUTES

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, the District of Columbia Workers' Compensation Act of 1979, and 28 U.S.C. § 1257 are reprinted in the Appendix at App. 74a-77a.

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[1] Because the Court of Appeals' judgment was entered prior to the effective date of the June 27, 1988 amendment to § 1257, certiorari is sought under unamended § 1257(3), rather than amended § 1257(a).

STATEMENT OF THE CASE

These three consolidated cases involve contractors claiming immunity under the District of Columbia workers' compensation statute from tort suits brought by injured employees. The contractors' entitlement to immunity turns on the meaning of statutory language which this Court definitively construed in *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984). *Johnson* declared the intent of that language to be "clear" and its meaning "plain," and held that under the language the contractors are entitled to immunity. *Id.* at 936, 938, 940-41.

In the present cases, however, the D.C. Court of Appeals has held that the language in fact has the opposite meaning, that this Court was wrong in *Johnson*, that the D.C. Court of Appeals is the "final arbiter" of this question and therefore need not follow *Johnson* if it disagrees with this Court, and that this Court has no power to review and overturn the D.C. Court of Appeals' decision in these cases. Based on this reasoning, the lower court denied immunity in these cases even though this Court's decision would require that immunity be granted. To explain how the D.C. Court of Appeals could have reached such a result, and why that result raises important questions meriting this Court's review, it is necessary first to trace the history of these cases beginning with the *Johnson* decision.

A. The *Johnson* Decision.

In *Johnson*, this Court granted certiorari to determine the meaning of a workers' compensation statute whose provisions were typical of those that have been adopted by every State in this country. The particular statute there at issue was that of the District of Columbia—the District of Columbia Workmen's Compensation Act of 1928, D.C. Code Ann. §§ 36-501 *et seq.* (1973) ("the 1928 Act"). That statute, in turn, simply made the provisions of the 1927 Longshoremen's and Harbor Workers' Act, 33 U.S.C. §§ 901 *et seq.* (1982) ("the Long-

shore Act"), applicable to employers and employees in the District of Columbia. As a consequence, although *Johnson* concerned the proper construction of the local D.C. statute (the 1928 Act), in order to construe that Act the Court was required to determine the meaning of the national Longshore Act. *See Johnson*, 467 U.S. at 928 & n.4.

The particular language at issue in *Johnson* was that of §§ 4 and 5 of the Longshore Act. Section 4 of the Act required every "employer" to secure worker-compensation coverage for all its employees; it further required that, where the employer was only a subcontractor, the contractor must itself secure the coverage "unless the subcontractor" has done so. Section 5, in turn, provided that the "employer" coverage responsibility under § 4 would be "exclusive and in place of all other liability" of employers to injured employees. The question raised by these provisions was: when, if ever, could a contractor meeting its coverage responsibilities under § 4 qualify for the immunity from further liability provided by § 5?

This Court noted that lower courts construing the Longshore Act and statutes patterned on that Act (such as the 1928 Act) had split on this question. Some had held that because § 5 gave immunity only to "employers," contractors could *never* qualify for that immunity, even where they had actually purchased the § 4 compensation coverage for injured employees. But "[t]he more widely held view," this Court noted, was that at least in some circumstances contractors *could* qualify for the § 5 "employer" immunity. Significantly, as the Court also noted, among the courts adhering to this majority view were the lower court in *Johnson* itself (the D.C. Circuit) and the D.C. Court of Appeals in a previous case. 467 U.S. at 933-34, *citing Johnson v. Bechtel Assocs. Professional Corp.*, 717 F.2d 574, 581 (D.C. Cir. 1983), *rev'd*, 467 U.S. 925 (1984); *DiNicola v. George Hyman Constr. Co.*, 407 A.2d 670, 674 (D.C. 1979). For two important reasons, this Court agreed with this majority view and found it "clear" that "employer"

immunity in § 5 "must have" been intended for contractors meeting their coverage responsibilities under § 4. 467 U.S. at 936.

First, when the Court read the compensation statute as a whole, it found numerous examples of "employer" responsibilities which *had* to be read to include contractors in order for the Act "to make any sense." *Id.* at 934-36 & n.10. For example, the actual payment of compensation benefits to injured workers was required to be made only by "employers" (under §§ 7, 8, 9), but, obviously, where a contractor secured those benefits, the contractor would be required and expected to make those payments. *Id.* Likewise, the enforcement provisions of the Act imposed criminal penalties for "employers" failing to secure compensation coverage, but if contractors were not intended to be subject to those penalties, the Act would have "no apparent mechanism" for ensuring that contractors meet their § 4 coverage responsibilities. *Id.* Accordingly, the only sensible reading of § 5 and the statute as a whole was that "employer" immunity was available to contractors meeting their coverage duties. *Id.*

Second, the Court found this reading "particularly" compelling because it was "consistent with the *quid pro quo* underlying workers' compensation statutes." *Id.* at 936. As the Court explained, the *quid pro quo* in "[t]hese statutes" reflects a "legislated compromise" between injured workers and those with responsibilities for ensuring compensation benefits for those workers: as a "reward" for guaranteeing compensation for the workers—regardless of who may have been at fault—the contractor/employer receives "immunity from . . . tort suits" by those workers. *Id.* at 931. "[I]t is obvious," the Court said, that a contractor meeting its responsibility to guarantee that compensation should receive the *quid pro quo* of immunity. *Id.* at 934 (quoting 2A A. Larson, *The Law of Workmen's Compensation* § 72.31(a), at 14-112 (1982)).

The only remaining issue for the Court to decide was: what must a contractor do to meet its § 4 coverage responsibilities and thereby be eligible for § 5 immunity? The D.C. Circuit in *Johnson* and the D.C. Court of Appeals in *DiNicola* had held that contractor immunity is available *only* where the immediate employer defaults on its coverage responsibility and the contractor thereafter secures the coverage. But as this Court held, while the compensation statute could have been written that way—and in some states *has* been written that way [2]—that is not what the language adopted in the D.C. statute said.

Instead, that language provides immunity *unless* the employer "fails to secure payment of compensation as required by this Act." Hence, the Court observed, "[i]mmunity is not cast as a reward for employers that secure compensation; rather, loss of immunity is levied as a penalty on those that neglect to meet their statutory obligations." 467 U.S. at 937. Accordingly, the Court concluded, the "plain language" of the statute gives immunity to contractors "unless the contractor has neglected to secure workers' compensation coverage after the subcontractor failed to do so." *Id.* at 938.

Moreover, the Court determined that this construction is not only "faithful to the plain language," but it also "furthers the policy underlying" the statute—"which is to ensure that workers are not deprived workers' compensation coverage." *Id.* If contractor immunity were not available until *after* a subcontractor had clearly defaulted in obtaining coverage and the contractor *then* acquired coverage, the result "inevitably" would produce "gaps" in the necessary coverage. In addition, such a rule would require "a difficult set of factual inquiries" that the legislature could not have intended. *Id.* at 939. The Court therefore held that under both the plain words of the statute and its underlying policies, "[s]o long as

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[2] The Court noted that the statutes in Nebraska and Indiana so provide. 467 U.S. at 937 n.11.

general contractors have not defaulted on this statutory obligation to secure back-up compensation for subcontractor employees, they qualify for . . . immunity." *Id.* at 940.

B. The 1984 Amendments to the Longshore Act.

In September 1984, Congress amended the Longshore Act's statutory language which this Court had construed in *Johnson*. The amendment was intended to deny immunity to contractors *unless* they actually secure coverage *and* the subcontractors fail to secure it. H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 24 (1984). As a result, the pertinent language of §§ 4 and 5 in the national Longshore Act now reads as follows: "[O]nly if [a] subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation." 33 U.S.C. § 904(a) (Supp. IV 1986). "For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section [4]." *Id.* § 905(a).

C. The Inapplicability of the 1984 Amendments to the District of Columbia.

In the wake of the 1984 Longshore Act amendments, the District of Columbia Courts (both the D.C. Circuit and the D.C. Court of Appeals) were required to decide whether those amendments apply to the District of Columbia, *i.e.*, whether the Congress had amended *both* the national 1927 Longshore Act *and* the 1928 D.C. Workmen's Compensation Act. Both the D.C. Court of Appeals and the D.C. Circuit held those amendments *inapplicable* to the District of Columbia because the local D.C. legislature (the D.C. Council) had previously repealed the 1928 Act and had replaced it with a new workers' compensation statute for the District—the District of Columbia Workers' Compensation Act of 1979, D.C. Code Ann. §§ 36-301 *et seq.* (1981) ("the 1979 Act"). *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C.

1985), *cert. denied*, 475 U.S. 1066 (1986); *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). This 1979 Act "divorced the local workers' compensation system entirely from the Longshore Act of 1927" and, accordingly, in the absence of any indication in the 1984 Amendments that Congress intended to overturn the 1979 Act and reinstate the 1928 Act, those amendments do not apply to the District. *O'Connell*, 495 A.2d at 1141, 1143; *Keener*, 800 F.2d at 1178-79. As a result, in cases still governed by the unamended language of the 1928 Act (as definitively construed in *Johnson*), contractors remain entitled to immunity unless Congress or the D.C. Council amends the pertinent language of the local statute.[3]

D. The Present Cases.

In the 1979 Act the D.C. Council re-enacted verbatim the pertinent provisions of §§ 4 and 5 of the Longshore Act which this Court construed in *Johnson*. And, because neither the Council nor the Congress has taken action to amend those sections in the local law (as Congress did in the national Longshore Act), the petitioner-contractors in these cases contended below that their immunity rights are controlled by *Johnson*'s construction of the statutory language in the governing local law. But the D.C. Court of Appeals has held otherwise.

Indeed, in two decisions handed down the same day (July 18, 1988), the D.C. Court of Appeals declared not only that *Johnson* was wrong and therefore need not be followed, but more importantly, that court also made three fundamental determinations concerning its authority vis-a-vis this Court: (1) that the D.C. Court of Appeals is the "ultimate arbiter" of local D.C. laws and

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[3] Even though the repeal of the 1928 Act became effective in 1982, claims arising before that date (including those at issue in *Johnson* itself) remain viable under the terms of the repealed 1928 Act by virtue of the District's saving statute. *See O'Connell*, 495 A.2d at 1141-42; *Keener*, 800 F.2d at 1179.

therefore any contrary construction of such local laws by this Court need not be followed; (2) that where the local legislature (whether the Congress or the D.C. Council) adopts verbatim a federal statute, this Court's definitive interpretation of that federal statute has "no application" to construction of the local statute; and (3) that laws applicable only to the District of Columbia—at least those adopted by the D.C. Council—are not reviewable by this Court unless they present a constitutional issue. The two D.C. Court of Appeals decisions at issue are *Meiggs v. Associated Builders, Inc.* (App. 1a-17a) and *Estep v. Construction Gen., Inc.* (App. 42a-70a). Although only *Meiggs* is before this Court in the present petition, that decision can be properly understood only when it is considered in the context of its companion case, *Estep*. We therefore describe both decisions here.

1. The *Estep* Decision.

The *Estep* case is on all-fours with *Johnson*: it concerned a D.C. contractor who did not default on its coverage responsibility under the 1928 Act. Accordingly, by virtue of *Johnson*'s construction of the immunity provision of the 1928 Act, on April 3, 1985, the Superior Court in the District of Columbia dismissed the employee's tort suit against the contractor.

On appeal, however, the D.C. Court of Appeals lingered for four years—twice entertaining oral argument—on the question whether that court should follow *Johnson* or, on the other hand, should follow its own previous 1928 Act decision (*DiNicola*) which this Court declined to follow in *Johnson*. In addition, the D.C. Court of Appeals *sua sponte* called for briefing from the parties and from the District of Columbia itself on the questions: (1) whether *Johnson* may be reconciled with *DiNicola*; (2) whether the D.C. Court of Appeals' jurisdiction over "local issues" is "equivalent for all purposes to that of the highest court of a state;" and (3) whether Congress' adoption of the 1928 Act represented an exercise of "national or federal" power or, alternatively, was an exercise of Congress' power under Article I, § 8,

Clause 17 of the Constitution to make laws for the District of Columbia. Order of March 11, 1986 (reprinted at App. 71a-73a).

Ultimately, a divided D.C. Court of Appeals determined that this Court's *Johnson* decision had "squarely rejected *DiNicola*'s understanding of . . . the Longshore Act, as incorporated in the 1928 Act." App. 48a. It furthermore determined that "because the 1928 Act merely incorporates the provisions of the Longshore Act, . . . Congress intended the construction of the local law and the federal law to be identical." App. 53a. Nevertheless, the court continued, it had the authority "to give the local law a gloss different from [this Court's] interpretation [of] . . . the federal law;" moreover, the court reasoned, even though *Johnson* had simultaneously construed both the federal Longshore Act and the local 1928 Act, there may be "circumstances in which we may nonetheless decline to follow a Supreme Court decision construing a local law adopted by the Congress," and, *a fortiori*, may do so in the case of a "local law adopted by the Council of the District of Columbia . . . . *See Meiggs v. Associated Builders, et al.*, 545 A.2d 631 (D.C. 1988)." App. 51a-52a.

Nevertheless, inasmuch as a majority of the *Estep* panel found "no reason" to treat the Longshore Act and the 1928 Act differently for purposes of the contractor immunity question at issue, it elected to follow *Johnson* and therefore affirmed the Superior Court's decision. App. 56a. In dissent, however, Judge Mack did find reason not to follow *Johnson*. Her *Estep* dissent is important here because in *Meiggs*—the cases now before this Court—Judge Mack's view became the majority and in those cases she wrote the opinion for the court refusing to follow *Johnson*.

In her *Estep* dissent, Judge Mack first asserted that the District of Columbia Court of Appeals is the "final expositor of District of Columbia law." App. 57a. She acknowledged, however, that this Court has often held

to the contrary. App. 58a. *See, e.g., Whalen v. United States*, 445 U.S. 684, 687 (1980) (acts "applying only within the District, like other federal laws, certainly come within this Court's Art. III jurisdiction, and thus we are not prevented from reviewing the decisions of the District of Columbia Court of Appeals interpreting those Acts in the same jurisdictional sense that we are barred from reviewing a state court's interpretation of a state statute"). Nevertheless, Judge Mack stated that she felt "compelled" to suggest "that it is not at all clear" that this Court is right in claiming jurisdiction over statutes affecting only the District of Columbia. App. 59a. She therefore found it "remarkable" that the *Estep* majority would not simply follow its own previous construction of the 1928 Act in *DiNicola*, rather than this Court's "conflicting" interpretation of that Act in *Johnson*. App. 57a.

Judge Mack, in any case, disagreed with the majority that this Court definitively interpreted the local 1928 Act in *Johnson*, App. 66a, even though she acknowledged that "it was the application of [the local Act] that was actually at issue in *Johnson*." *Id.* In her view, this Court should always defer to a D.C. Court of Appeals' construction of local law, even where—as in *Johnson*—"a question of local law cannot be separated from a question of general law." App. 63a. She believed this Court simply overlooked this principle in *Johnson*: "the *Johnson* Court did not afford its normal deference to this court because *it did not realize that deference was appropriate*." App. 66a (emphasis supplied).

Accordingly, Judge Mack concluded that *Johnson* has not "interpreted the statutory provisions at issue"—even though they were the very provisions at issue in *Johnson*—and that the D.C. Court of Appeals is therefore not "constrained by conflicting Supreme Court precedent as a result of *Johnson*." App. 67a. She furthermore would not have followed *Johnson* because, in her view, that decision "did not comport with the philosophy underlying workers' compensation schemes," App. 67a-68a,—

the opposite conclusion from that reached by Justice Marshall for this Court. *Compare Johnson*, 467 U.S. at 936 ("granting tort immunity to contractors that comply with § 4(a) is consistent with the *quid pro quo* underlying workers' compensation statutes") *with Estep*, at App. 68a ("general contractor immunity destroys the *quid pro quo* of workers' compensation") (Mack, J., dissenting). For all these reasons, Judge Mack would not have followed this Court's decision.

2. The *Meiggs* Decision.

While the *Estep* majority declared that it did not have to reach the question whether it could "decline to follow a Supreme Court decision construing local law," App. 51a, in *Meiggs*—the cases now before this Court—that question was reached and Judge Mack's view prevailed.

In *Meiggs*—as was true in *Johnson* and *Estep*—the court again faced the circumstances of contractors that had not defaulted under their § 4 duty to provide compensation coverage and therefore asserted § 5 immunity against tort suits brought by employees who had already received their workers-compensation benefits. And, again as was true in *Johnson* and *Estep*, the local D.C. law incorporated verbatim the pertinent provisions of §§ 4 and 5 construed by this Court in *Johnson*. The only difference between *Johnson* and *Meiggs* was that in *Johnson* §§ 4 and 5 were incorporated in the local 1928 Act while in *Meiggs* they were incorporated in the local 1979 Act (which had repealed the 1928 Act).

The trial courts in the *Meiggs* cases divided over whether to follow *Johnson* or *DiNicola*. In *Meiggs* itself (*Meiggs v. Associated Builders*) as well as in *Frazier v. Faith Constr. Co.*, Judges Holmes and Wertheim, respectively, followed *Johnson*. *See* App. 4a. In *Hobbs v. KBR Corp.*, however, Judge Weisberg followed *DiNicola*. *See id.*[4]

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[4] A comparable division has occurred among the lower federal courts in the District of Columbia. Thus, in *Ford v. United States*,

On appeal, the cases were consolidated and decided the same day as *Estep* in an opinion by Judge Mack (joined by Chief Judge Rogers and Judge Steadman). In that opinion—which rejected *Johnson* and followed *DiNicola*—Judge Mack relied largely on the same rationale that was advanced in her *Estep* dissent.

Thus, Judge Mack began the *Meiggs* decision, as she did her *Estep* dissent, with the proposition that on questions of local law, "this court is undeniably the final arbiter." App. 6a. As regards local statutes, she held, "interpretations by this court will be binding;" however, "interpretations by another court"—including this Court in *Johnson*—"carry no precedential value." App. 11a. She added that, in any event, "*Johnson* . . . has very little, if any, persuasive value" because Congress subsequently amended the provisions of the national Longshore Act construed in that case. App. 6a.

Considering itself thus "[f]reed of the encumbrances flowing from contradictory judicial interpretations, and strained reliances on *Johnson*," the lower court considered anew the precise statutory language this Court had already construed in *Johnson*. App. 6a-7a (footnote omitted). After analyzing both the provisions of §§ 4 and 5 of the Longshore Act (as incorporated in the local act) as well as the remaining provisions of the local act (as also incorporated from the Longshore Act), the court came to the opposite conclusion as did this Court: that "the plain language and overall structure of the [local] Act," as well as the *quid pro quo* underlying the Act, demonstrate that the *only* circumstances in which contractor immunity is available is "when the actual em-

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No. 84-3082 (D.D.C. Mar. 22, 1985) and *Stokes v. George Hyman Constr. Co.*, No. 84-1418 (D.D.C. Jan. 18, 1985), *appeal filed*, No. 84-5147 (D.C. Cir. Jan. 24, 1985), Judges Pratt and Parker, respectively, followed *Johnson*. On the other hand, in *Allen v. United States*, 625 F. Supp. 841 (D.D.C. 1986), Judge Richey followed *DiNicola*. Resolution of this conflict among the federal district courts is now pending in the D.C. Circuit in the *Stokes* case, which was stayed awaiting the outcome in *Meiggs*.

ployer—the subcontractor—defaults on its statutory obligation, and the general contractor steps in to secure payment." App. 9a-10a. Judge Mack therefore reinstated the *DiNicola* holding and did so—as *Johnson* made clear—without addressing the fact that that holding cannot be squared with *the language* of § 5 itself.[5] As a result, she denied immunity in the present cases.

3. Rehearing Denials in *Estep* and *Meiggs*.

Given the conflicting, simultaneous decisions in *Estep* and *Meiggs*—one case denying immunity to contractors, the other granting it, even though both cases construed the *identical* language of the Longshore Act as incorporated in successive local acts—rehearing *en banc* petitions were filed in both cases. In a single consolidated order (issued Jan. 18, 1989), the court denied both petitions, leaving the conflict unresolved. App. 36a-39a. The court denied the petition in *Meiggs* by a vote of 6-2. It denied the petition in *Estep* 4-4. The court thereafter denied 6-2 a motion for reconsideration in *Estep* which sought a new vote once a ninth judge is added to the court. App. 40a. Chief Judge Rogers and Judge Mack (two of the judges forming the majority in *Meiggs*) voted to grant this motion. They had previously voted to deny *en banc* hearing in *Meiggs* but to grant it in *Estep*.

REASONS FOR GRANTING THE WRIT

This is an extraordinary case. It presents the spectre of a lower court declaring that *this Court* erred in failing to follow *that court's* construction of statutory language, declaring further that that lower court will not

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[5] In addition to her disagreement with this Court concerning the meaning of the statutory language, Judge Mack premised her decision on certain policy arguments and on the principle that the legislature knew about and intended to adopt the *DiNicola* decision when it passed the statute. As explained below, the cited policy arguments were not accepted by this Court in *Johnson* and the cited principle of statutory construction is wholly inapplicable to the present cases.

adhere to this Court's contrary construction of the pertinent language, and declaring, moreover, that this Court has no jurisdiction to prevent such a defiance of its own previous decision. Furthermore, in its determination to establish itself as the "ultimate arbiter" of the statutory question at issue and to override this Court's view of that issue, the lower court has effectively amended a statute which the Congress and the D.C. Council have chosen not to amend. Finally, in its insistence that its authority is equal to those of a state supreme court, the D.C. Court of Appeals has in fact claimed greater authority than that exercised by state supreme courts.

Such action raises serious, fundamental questions about the relationship between this Court and the D.C. Court of Appeals, about that court's role as the highest court of the District of Columbia, about the appropriate method for that court to interpret a D.C. statute patterned on a federal statute, and about the division of responsibility between that court and the Congress and the D.C. Council. As to each of these important questions, as further explained below, the judgment of the D.C. Court of Appeals conflicts not only with prior decisions of this Court, but with the unanimous decisions of state courts that have addressed similar questions. For all these reasons, the petition for certiorari should be granted.

1. The Court Should Grant Certiorari to Clarify Its Jurisdiction Over Decisions of the D.C. Court of Appeals.

Through Judge Mack's opinion, the D.C. Court of Appeals has concluded that this Court lacks the authority to review that court's interpretation of the D.C. Workers' Compensation Act of 1979: "On a question of purely local law, this court [the D.C. Court of Appeals] is undeniably the *final* arbiter." App. 6a (emphasis supplied). Judge Mack further held that "interpretations by [the D.C. Court of Appeals] will be binding"; however, "interpretations by another court [including this Court in *Johnson*] carry no precedential value." App. 11a. In her

Estep dissent, she elaborated on this view of the relationship between this Court and the D.C. Court of Appeals: "I feel compelled . . . not to shirk from suggesting, however delicately, that it is not at all clear that acts of Congress affecting only the District are 'laws of the United States' within the meaning of Article III." App. 59a.

Judge Mack's conclusion directly contradicts the principles enunciated by this Court in *Whalen v. United States*, 445 U.S. 683 (1980). There, this Court held that acts affecting only the District constitute *federal* law, not "purely local law" as the Court of Appeals assumed. *Id.* at 687. More importantly, the Court held that such acts, "like other *federal* laws, certainly come within this Court's Art. III jurisdiction, and thus *we are not prevented from reviewing the decisions of the District of Columbia Court of Appeals interpreting those Acts* in the same jurisdictional sense that we are barred from reviewing a state court's interpretation of a state statute." [6]

It is true that in *Whalen* and *Pernell* this Court was addressing *Acts of Congress* made applicable only to the District, rather than (as here) a statute enacted by the *D.C. Council* and made applicable only to the District. However, Congress' determination to permit the D.C. Council to make laws in the first instance for the District—subject to Congress' review and approval [7]—should not serve to oust this Court of jurisdiction to review such laws. Those laws remain, ultimately, Acts of Congress, inasmuch as they are passed pursuant to Congress' nondelegable, constitutional authority to make laws for the District of Columbia. U.S. Const., art. I, § 8, cl. 17.

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[6] *Id.* at 687-88 (emphasis supplied); *accord Pernell v. Southall Realty*, 416 U.S. 363, 368 (1974).

[7] *See* District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. No. 93-198, §§ 602(c)(1), 602(c)(2), 87 Stat. 774, 814 (current version at D.C. Code Ann. §§ 1-233(c)(1), 1-233(c)(2) (1987)).

Accordingly, the principle announced in *Whalen* and *Pernell* should govern all Acts made applicable only to the District, whether passed initially by Congress or approved by Congress after action by the D.C. Council.

In reaching her contrary conclusions, Judge Mack asserted that there is doubt whether this Court can review even Acts of Congress made applicable to the District, unless the Act presents a constitutional issue. App. 63a-64a. To support this view, she further asserted that "the Supreme Court, understandably in decisions over the years, has not been entirely consistent in its jurisdictional treatment of congressional acts affecting only the District." App. 60a-61a (footnote omitted). Judge Mack's reference is to the cases construing this Court's authority over the D.C. Court of Appeals pursuant to 28 U.S.C. § 1257.

The first such case was *Palmore v. United States*, 411 U.S. 389 (1973), which presented an *appeal* under 28 U.S.C. § 1257(2) (1982) and concerned a state statute that was sustained over a challenge that it was "repugnant to the Constitution, treaties, or laws of the United States." [8] The Court concluded that "Congress [did not] intend[] to treat the District of Columbia Code as a state statute for the purposes of § 1257(2)" and accordingly reviewed petitioner's claim pursuant to its certiorari authority under § 1257(3). 411 U.S. at 396. Since the *Palmore* Court determined that the constitutional issues raised by the petitioner provided a basis for jurisdiction under § 1257(3), the Court did not decide whether a claim made under the District of Columbia statute could *in itself* be a basis for jurisdiction.

Subsequently, in *Key v. Doyle*, 434 U.S. 59 (1977), review was sought of a D.C. Court of Appeals' decision pursuant to § 1257(1), which at that time provided for

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[8] As this Court is aware, under the terms of the revised statute, review of D.C. Court of Appeals' decisions is now available only by writ of certiorari. 28 U.S.C.A. § 1257 (Supp. 3 Oct. 1988) (effective date Sept. 27, 1988).

review "by *appeal*, where is drawn into question the validity of a treaty or statute *of the United States* and the decision is against its validity." (Emphasis supplied.) The statute at issue, which was enacted by Congress rather than by the D.C. Council, voided certain religious bequests and devises. In concluding that "no right of appeal should lie to this Court when a local court of the District invalidates a law of exclusively local application," *id.* at 68, the Court stated: "From such judgments . . . there is . . . review by writ of certiorari according to the terms of § 1257(3)." *Id.* Again, however, the Court did not address whether the "terms of § 1257(3)" permitted review of a D.C. statute in the absence of a constitutional question.[9]

Taken together, *Palmore* and *Key* do not definitively resolve the question whether this Court has jurisdiction under § 1257 to review D.C. Court of Appeals' interpretations of District of Columbia statutes where no constitutional issue is presented. In a dissenting opinion in *Key*, Justice White (joined by Chief Justice Burger and Justices Blackmun and Powell) addressed this question as follows:

> The majority's construction of "statute of the United States" in § 1257(1) is . . . disturbing because it may ultimately undermine this Court's certiorari jurisdiction over cases from the D.C. Court of Appeals. The majority does not explain its rationale for assuming certiorari jurisdiction in this case. Presumably it views this case as one in which a "right" has been "specially set up or claimed under the Constitution" within the meaning of § 1257(3). However, in cases involving the construction of federal laws dealing with the District of Columbia, that approach would not be available. While there is pro-

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[9] The Court limited its conclusion that the laws of the District of Columbia are not "statutes of the United States" to the terms of § 1257(1), *see* 434 U.S. at 67 n.12, cautioning that "each jurisdictional provision is to be interpreted in the light of its own antecedents, purposes and context." *Id.* at 64 n.6.

> vision in § 1257(3) for cases in which the right is derived from a "statute" of the United States, invocation of that provision would require that the Court interpret identical words in the jurisdictional statute in two different ways, a practice the majority evidently disapproves. See *ante*, at 62-63 n. 5. Thus, this Court may ultimately be left with no jurisdiction whatsoever over cases in which the D.C. Court of Appeals construes a federal statute dealing with the District of Columbia.

434 U.S. at 74-75 & n.6 (White, J., dissenting).

It was apparently Justice White's observations in *Key* that caused Judge Mack to conclude that this Court lacks jurisdiction to review her decision and that authorized her to flout *Johnson*. Yet, as Justice White also observed, "[i]t is highly improbable that Congress would have given such free rein in interpreting federal laws to a court which it regarded as 'the highest court of a State' or that it would have so restricted this Court's appellate jurisdiction without expressly saying so." *Id.* at 75 n.6.

In light of the ambiguity left by *Whalen*, *Key*, and *Palmore*, this Court should now clarify its jurisdiction over the D.C. Court of Appeals. For several reasons, this case presents an especially appropriate vehicle for doing so. First, the jurisdictional issue has already been addressed by the lower court itself. Second, the lower court has used its position on the jurisdictional issue as a justification for refusing to follow precedent from this Court (*Johnson*) that is squarely on point; denial of certiorari would therefore leave standing a decision authorizing the D.C. Court of Appeals to ignore any and all precedents from this Court interpreting D.C. laws.[10] And third, this case concerns a law passed not by the Congress, but by the D.C. Council—an additional factor whose significance this Court has never addressed.

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[10] Inasmuch as *en banc* hearing was denied in *Meiggs*, that decision now constitutes binding precedent for all future D.C. Court of Appeals' decisions. *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

Accordingly, in order to give guidance both to the D.C. Court of Appeals and to parties considering petitioning this Court for review of that court's decisions, the writ should be granted.

2. The Court Should Grant Certiorari to Preserve the Integrity of Its Decisions and to Clarify Its "Deference" Policy with Regard to D.C. Court of Appeals' Decisions.

In concluding that *its* interpretation of the language at issue is the "ultimate" one, the D.C. Court of Appeals relied on the proposition that this Court must defer to that court's construction of local laws. Indeed, Judge Mack's *Estep* and *Meiggs* opinions together make clear her view that *this Court erred* in failing to defer to *DiNicola* in *Johnson* and that deference is required as to all D.C.-law constructions in the absence of an intertwined constitutional issue. On that basis, she refused to follow *Johnson*. Her analysis and decisions represent a serious failure to accord proper respect to this Court and a fundamental misunderstanding of this Court's deference policy.

This Court provided its most recent statement of its policy of deferring to the interpretations of the D.C. Court of Appeals in *Whalen*: "[O]n matters of *exclusively* local concern," this Court will defer to the decisions of courts of the District of Columbia. 445 U.S. at 687 (emphasis supplied). The overriding fallacy in Judge Mack's analysis is her supposition that the issue presented in *Johnson*, *Estep*, and *Meiggs* was "exclusively local." But it is not, as this Court made clear over fifty years ago.

In *Del Vecchio v. Bowers*, 296 U.S. 280 (1935), this Court was faced with the same proposition asserted by the D.C. Court of Appeals here—that the construction of a provision of the national Longshore Act as incorporated into District law did not present a federal issue, and that, as a result the Court should not review it.

The *Del Vecchio* Court squarely rejected that proposition, stating that:

> [t]he objection might be valid if the statute were confined in its operations to the District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District. The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement constitutes a precedent of general application.

296 U.S. at 285. The *Del Vecchio* decision makes clear that this Court—not the D.C. Court of Appeals—is the "ultimate arbiter" of the statutory question presented in *Johnson* and that that question is *not* an exclusively local one. Accordingly, this Court did *not* err in *Johnson* in declining to follow the *DiNicola* decision.[11]

Furthermore, even if this Court *had* erred in *Johnson* in its interpretation of the local D.C. law and in its refusal to accord deference to the contrary interpretation of that law by the D.C. Court of Appeals, the latter court has no authority to defy this Court's decision. Once *this Court* definitively interpreted the language at issue and chose not to defer, that decision was the "ultimate" one.

Accordingly, the Court should grant certiorari to maintain its authority over the D.C. Court of Appeals and to clarify its deference policy with regard to that court's decisions. For the Court to do otherwise would leave intact the D.C. Court of Appeals' "reversal" of this Court and would invite similar reversals with regard to any D.C. law being interpreted by the lower court.

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[11] Moreover, even as to matters of "exclusively local concern," this Court retains power to reject a D.C. Court of Appeals' decision constituting "egregious error." *Pernell*, 416 U.S. at 368-69. It is hard to see how the present decision can fail to qualify for that label: it has declared statutory language definitively construed by this Court to mean the opposite of what this Court said it plainly means.

3. The Court Should Grant Certiorari to Define the D.C. Court of Appeals' Authority in Interpreting D.C. Statutes Patterned on a Federal Statute.

A key underpinning of the lower court's judgment was its claim to possess authority equal in all respects to that of a state supreme court. *See* App. 6a, 61a-64a. While this Court's decisions demonstrate that this claim is unfounded,[12] in effect the judgment below constitutes an assertion of *greater* power than that exercised by state supreme courts. Indeed, even if the D.C. Court of Appeals were in some circumstances permitted to depart from this Court's definitive construction of a federal statute whose language has been adopted for the District of Columbia, the D.C. Court of Appeals' approach on this question conflicts with that of every state supreme Court which has faced it.

The universally-followed rule in other state courts is that federal court constructions of a federal statute are persuasive authority and are entitled to great weight in the interpretation of a state statute patterned on the federal statute.[13] These state courts have found it ap-

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[12] *See Whalen*, 445 U.S. at 687-88 (decisions of D.C. Court of Appeals concerning Acts of Congress affecting only the District are not barred from Supreme Court review "in the same jurisdictional sense" as is a "state court's interpretation of a state statute"); *Pernell*, 416 U.S. at 368 n.4 ("We do not intend to imply that the District of Columbia Superior Court and Court of Appeals must be treated as state courts for all purposes.").

[13] *See, e.g., SCA Constr. Supply v. Aetna Casualty & Surety Co.*, 754 P.2d 1339, 1341 (Ariz. 1988) (when state legislature adopts or models statute after that of federal government, federal judicial interpretations of federal statute "will be persuasive in interpreting the Arizona statutory counterpart"); *Stephens v. Coldwell Banker Commercial Group, Inc.*, 199 Cal. App 3d 1394, 1399, 245 Cal. Rptr. 606, 609 (1988) (because language and objectives of state statute parallel language and objective of federal statute, state court will refer to federal decisions where appropriate); *People v. Wahl*, 716 P.2d 123, 128 (Colo. 1986) (state statute closely-patterned after federal act, so federal authorities explaining federal act should be accorded "great weight" in interpreting state statute); *Oppen-*

propriate to depart from the established meaning of the adopted federal statute only where there is a clear, af-

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heimer & Co. v. Young, 456 So. 2d 1175, 1178 (Fla. 1984) (state court will normally give same construction to state statute as federal courts give to corrollary federal statute), *vacated on other grounds*, 470 U.S. 1078 (1985); *State v. Thompson*, 745 P.2d 1087, 1093 (Idaho Ct. App. 1987) (state court relied on federal construction of federal statute in interpreting analogous state statute), *aff'd in part and rev'd in part on other grounds*, 760 P.2d 1162 (Idaho 1988); *Wapella Educ. Ass'n, IEA-NWA v. Illinois Educ. Labor Relations Bd.*, 531 N.E.2d 1371, 1376 (Ill. App. Ct. 1988) (decisions of federal courts interpreting similar provisions under federal act are "persuasive authority" for state court construing state statute); *Adam v. Mount Pleasant Bank & Trust Co.*, 340 N.W.2d 251, 252 (Iowa 1983) (because state statute "based on" federal act, federal decisions interpreting federal act entitled to "great weight" in interpreting state statute); *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 493 So. 2d 1149, 1158 (La. 1986) (because state statute is counterpart to federal act, U.S. Supreme Court's interpretation of federal act should be "persuasive influence" on interpretation of state statute); *Gardner v. State*, 549 A.2d 1171, 1176 (Md. Ct. Spec. App. 1988) (because provisions of state and federal law are so similar, state court should be guided by case law interpretation of federal statute when examining state analog); *Faulk v. State's Attorney for Harford County*, 474 A.2d 880, 887 (Md. 1984) (where purpose and language of federal statute are substantially the same as later state statute, interpretations of federal statute are "ordinarily persuasive"); *Howard v. Town of Burlington*, 506 N.E.2d 102, 105 (Mass. 1987) (in construing state statute, state court is ordinarily guided by construction given parallel federal statute by federal courts); *Airport Inn, Inc. v. Nebraska Equal Opportunity Comm'n*, 353 N.W.2d 727, 731 (Neb. 1984) (because state statute is patterned after portion of federal act, it is appropriate to look to federal court decisions construing similar and parent federal legislation); *Benavidez v. Benavidez*, 660 P.2d 1017, 1021 (N.M. 1983) (because state rule of procedure is worded same as federal rule, it is appropriate to look at federal law construing federal rule when interpreting state rule); *Dreyfus Special Income Fund, Inc. v. New York State Tax Comm'n*, 514 N.Y.S.2d 130, 134 (N.Y. App. Div. 1987) (terms used in state tax law are to be accorded same meaning as those used in federal tax law), *aff'd*, 528 N.E.2d 509 (1988); *Stone v. Lynch*, 315 S.E.2d 350, 352 (N.C. Ct. App. 1984) (when state and federal statutes contain identical language, federal interpretations are "instructive"), *aff'd*, 325 S.E.2d 230 (N.C. 1985); *State v. Gallant*, 764 P.2d

firmative indication that the state legislature intended a different meaning.[14]

The D.C. Court of Appeals completely departed from this rule. Although that court was construing language taken from the Longshore Act which this Court has definitively construed in *Johnson*, the court declared *Johnson* to have "very little, if any, persuasive value" and determined the intent of that language as if it were

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920, 922 (Or. 1988) ("[i]nterpretations of federal statutes often are persuasive in the interpretation of identical provisions of state law"); *Marchant v. Hamilton*, 309 S.E.2d 781, 783 (S.C. Ct. App. 1983) (interpretations of federal statute given "great weight" in construing state statute having substantially identical wording); *State v. Kirk*, 699 S.W.2d 814, 818-19 (Tenn. Crim. App. 1985) (state rule of criminal procedure which paralleled federal rule was to be interpreted in line with federal construction), *cert. denied*, 475 U.S. 1023 (1986); *In re Local 1201, AFSCME, Rutland Dep't of Pub. Works*, 469 A.2d 1176, 1179 (Vt. 1983) (state court will look for guidance to federal decisions interpreting federal act which parallels state statute); *Virginia Dep't of Labor and Indus. v. Westmoreland Coal Co.*, 353 S.E.2d 758, 763 (Va. 1987) (state court looks to prior interpretations of federal statute when state adopts language substantially similar to federal language); *Gray v. Marshall County Bd. of Educ.*, 367 S.E.2d 751, 755 (W. Va. 1988) (court applied federal decisional law construing federal statute when interpreting identical state statutory language); *Apodaca v. State*, 627 P.2d 1023, 1027 (Wyo. 1981) (since state statute was derived from federal act, court views federal case law on the latter as "convincing authority" when construing the former); *see also State v. Earls*, 752 P.2d 402, 404 (Wash. Ct. App. 1988) (in construing its own state statute, state court relied on U.S. Supreme Court construal of a sister state's statute which had identical language).

[14] *See, e.g., Gallant*, 764 P.2d at 922 (federal construction overridden when an intent to change meaning of state statute is signaled by an amendment); *Lynch*, 315 S.E.2d at 352-53 (construction of analogous federal statute may be disregarded where state legislature clearly intended federal practice *not* to control); *Dreyfus Special Income Fund, Inc.*, 514 N.Y.S.2d at 134 (disregard of federal construction permissible only where a different meaning is "clearly required" by state statute).

a matter of first impression. App. 6a. Judge Mack's *Meiggs* decision therefore analyzed the *same* statutory provisions and the *same* policy considerations underlying those provisions that this Court had analyzed in *Johnson* and simply came to the opposite conclusion about the "plain" meaning of those provisions. App. 10a. And, contrary to the requirement of other state courts,[15] Judge Mack could point to *no* clear, affirmative indication that the D.C. Council intended the words it adopted from the federal statute to have a meaning different from that federal statute.[16] She simply disagreed with this Court's reading of the language and so rejected it.

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[15] The requirement followed in the state courts is also the one observed by this Court. When a statute (as here) is revised or reenacted, "no changes of law or policy are to be presumed . . . unless an intent to make such changes is *clearly expressed.*" *Fourco Glass Prods. Co. v. Transmirra Corp.*, 353 U.S. 222, 227 (1956) (emphasis supplied).

[16] Judge Mack did purport to confirm her reading of the "plain" language of the statute by relying on the presumption that the D.C. Council knew about and intended to adopt the *DiNicola* decision when it incorporated §§ 4 and 5 of the Longshore Act into the local 1979 Act. App. 13a-14a. For several reasons, this presumption cannot begin to constitute the *affirmative* indication of legislative intent required by *Fourco* and by the approach of other state courts.

First, where, as here, the language of the statute is found to be "plain," resort to extrinsic presumptions about contrary legislative intent are impermissible. "If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is a 'clearly expressed legislative intent to the contrary.'" *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 110 (1983) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Second, as Chief Justice Warren wrote for the Court in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955), the presumption that re-enactment of certain statutory language indicates adoption of a prior judicial construction of that language—"particularly without the slightest *affirmative* indication" that the legislature knew about the construction—"is an unreliable indicium

Accordingly, while this Court's decisions indicate that the D.C. Court of Appeals' authority is not equal to that of a state supreme court, here that court has claimed authority greater than that exercised by state supreme courts. This Court should therefore grant certiorari to clarify the D.C. Court of Appeals' authority in the circumstances presented by this case.

4. The Court Should Grant Certiorari to Preserve the Authority of the Congress and the D.C. Council to Make Laws for the District of Columbia.

In denying immunity to the contractors in these cases, Judge Mack relied heavily on the proposition that to do otherwise would be "unfair," would be contrary to the "humane purpose" of workers' compensation statutes, and would work an abrogation of common-law rights. App. 15a-16a, 68a.[17] But these are all policy considerations for legislatures to weigh; they are not factors justifying a court departing from the plain language the legislature has written.[18] As this Court and the lower

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at best." Such an unreliable indicium is, *a fortiori*, insufficient to contradict statutory language whose meaning is "plain."

Finally, a presumption that the D.C. Council knew about and adopted the *DiNicola* decision is in any event inappropriate. As the D.C. Court of Appeals itself has recognized, the presumption of legislative adoption applies only to "known and settled" prior judicial interpretations, *Lenaerts v. Dep't of Employment Servs.*, 545 A.2d 1234, 1238 (D.C. 1988) (citing, *inter alia, Capital Traction Co. v. Hof*, 174 U.S. 1 (1899)), and a single court of appeals' decision "does not approach the dignity of a well settled interpretation." *United States v. Raynor*, 302 U.S. 540, 551-52 (1938). The statutory provisions here at issue were introduced *before DiNicola* was decided by the D.C. Court of Appeals (and they remained substantively unchanged through enactment), and that decision (which *reversed* the lower court) resolved a matter of first impression for the local D.C. courts.

[17] Similar policy arguments were made to this Court in *Johnson*. *See* Brief for the Respondents, at 30-35, *Johnson*, 467 U.S. 925 (1984).

[18] Judge Mack also purported to rely on certain legislative history. But that history sheds no light whatever on the immunity question here at issue and, in any event, where, as here, the lan-

courts have often held, the judiciary's function—its only function—is to enforce the words the pertinent legislative body has adopted; it is not to remedy perceived legislative mistakes or to carry out judicial perceptions of wise policy.[19] The court in *Meiggs* violated this fundamental

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guage of the statute is plain, resorts to legislative history are inappropriate. *See, e.g., Davis v. Michigan Dep't of Treasury*, 57 U.S.L.W. 4389, 4390 n.3 (Mar. 28, 1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute.") (citing *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977)); *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (Court found "canvass[ing]" of legislative history to be "irrelevant" because " '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete' ") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *Wilbur v. United States*, 284 U.S. 231, 237 (1931) (consideration of legislative history "not . . . permissible" when language and meaning of statute are clear); *United States v. Missouri Pac. R.R. Co.*, 278 U.S. 269, 278 (1929) ("[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."). Moreover, as another panel of the D.C. Court of Appeals made clear in *O'Connell*, the legislative history clearly demonstrates that a prime motivating purpose of the 1979 Act was to equalize the benefits and burdens of D.C. employers with their counterparts in Maryland and Virginia. 495 A.2d at 1141 & n.13. *Meiggs* clearly undercuts that purpose by denying immunity to D.C. contractor/employers where their Maryland and Virginia counterparts would receive it. *See* Brief for the Commonwealth of Virginia and the State of Maryland as *Amici Curiae* in Support of the Petitioner, at 4-8, *Johnson*, 467 U.S. 925 (1984).

[19] *See, e.g., Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 378 (1973) ("It is not a function of the courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner."); *City of Greenwood v. Peacock*, 384 U.S. 808, 834 (1966) (it is for Congress, not the Supreme Court, to make changes to settled interpretation of statute); *Franklin v. First Money, Inc.*, 427 F. Supp. 66, 71 (E.D. La. 1976) ("courts may not ignore the clear wording of statutes and impose, in lieu of those statutes, measures that seem more just or efficacious"), *aff'd*, 599 F.2d 615 (5th Cir. 1979); *Herzberg v. Finch*, 321 F. Supp. 1367, 1369 (S.D.N.Y. 1971) (court

principle and, accordingly, once again claimed greater powers than those exercised by state supreme courts.

In the wake of *Johnson*, those state legislatures wishing to deny immunity in the circumstances presented here have appropriately revised their respective workers' compensation statutes. For example, on May 28, 1988 Connecticut amended section 31-291 of its workers' compensation act to deny immunity to a principal employer who procures work to be done for him by a contractor, or through him by a subcontractor, "unless such principal employer has paid compensation benefits . . . to [a]n injured employee . . . ." Similarly, in 1986 the Virgin Islands legislature amended the exclusive-remedy provision of its Workmen's Compensation Act to eliminate the statutory employer doctrine, which granted immunity not only to a worker's immediate employer but also to a secondary employer. *See Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1260 (3d Cir.) (Stapleton, J., dissenting), *cert. denied*, 108 S. Ct. 452 (1987).[20]

However, with the exception of the D.C. Court of Appeals in this case, *every* court that has faced the question has determined that *Johnson*'s construction of the pertinent language is definitive *unless* the legislature has amended that language. For example, in *Keener*, the D.C. Circuit expressly determined that because the 1984

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does not have power to amend legislative act in order to rectify alleged congressional "oversight;" court must interpret statute that is clear and unambiguous and not legislate contrary result).

[20] Significantly, the legislative history of the Virgin Islands amendment explains that the legislature believed the amendment was needed because in granting such immunity to secondary employers its courts had been interpreting the prior exclusive remedy provision in a manner "the [l]egislature never intended." *Id.* (quoting explanation attached to Bill No. 498, 16th Legislature (1986)). Moreover, in taking this action the legislature specifically cited the circumstances of *Johnson* and Congress' 1984 Amendments. *Id.*

Amendments do not apply to the District of Columbia, *Johnson*'s construction of the unamended 1928 Act governs in the District of Columbia. 800 F.2d at 1178-79.[21] Similarly, in *Garvin v. Alumax of S.C., Inc.*, 787 F.2d 910, 916-17 (4th Cir. 1986), *cert. denied*, 479 U.S. 914 (1986), the Fourth Circuit noted that prior to the 1984 Amendments the Longshore Act and South Carolina's Workmen's Compensation Act "were completely congruent" with respect to the issue of general contractor immunity. *Id.* at 916. The court furthermore noted that "nothing done in the Congress [in its 1984 Amendments] suggests that it intended to modify immunities provided general contractors by state workmen's compensation laws, when those laws are applicable." *Id.* at 917. Therefore, the court concluded that *Johnson* continues to be the correct interpretation of general contractor immunity under South Carolina's workers' compensation law.[22]

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[21] *Cf. Webb v. Montana Masonry Constr. Co.*, 761 P.2d 343 (Mont. 1988). There the Montana Supreme Court explained that prior to state constitutional and statutory amendments in 1972 and 1973 it had adopted the majority view extending immunity to statutory employers. *See id.* at 345-47. However, the court noted that after the amendments the grant of immunity had been "excised from Montana law, root and branch, forever." *Id.* at 347. Accordingly, in denying immunity to a general contractor the court found *Johnson* to be distinguishable because "under the law in Montana . . . the immediate employer is ultimately liable and . . . there is no requirement that the contractor carry compensation insurance if its subcontractor does not." *Id.* at 349.

[22] Other courts have likewise recognized that this Court's decision in *Johnson* is still the dispositive interpretation of the language at issue there, regardless of the fact that Congress subsequently amended the language. *See, e.g., Louviere v. Marathon Oil Co.*, 755 F.2d 428, 429 (5th Cir. 1985) (per curiam) (district court correctly applied *Johnson* in holding that general contractor was immune from suit because subcontractor had secured compensation, but 1984 amendments enacted after district court's decision required reversal)

In this case, the D.C. Council, like most legislatures,[23] has not amended the D.C. law.[24] Nor has Congress taken action to amend that law. Nevertheless, the D.C. Court of Appeals has taken action *for* the D.C. Council and, through its *Meiggs* decision, has effectively amended the D.C. statute. In so doing, that court not only acted contrary to every other court facing a similar issue, but more importantly, the court contradicted fundamental principles established by this Court concerning the role of the courts vis-a-vis the legislature. This Court should therefore grant certiorari to limit the D.C. Court of Appeals' role in such circumstances and preserve the authority of the Congress and the D.C. Council to make laws for the District of Columbia.

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[23] Indeed, in his authoritative treatise on workers' compensation law, Professor Larson emphasizes that the *Johnson* decision "strongly confirmed" the "marked trend" toward granting immunity to general contractors when their subcontractors are also insured because "the relevant portions of the Longshoremen's Act are *sufficiently similar to* corresponding portions of *most state acts* to permit this case to be used as persuasive authority." 2A A. Larson, *The Law of Workmen's Compensation*, § 72.31(b), at 14-177 (1988) (emphasis supplied). Professor Larson commented that Justice Marshall, by explaining that "the term 'employer' in compensation law had come to include the statutory employer," interpreted the relevant language in the way that "best carries out the compromise inherent in a compensation act." *Id.* at 14-178. In addition, Professor Larson noted that even the dissenting opinion in *Johnson*, which analogized general contractors to "back-up quarterbacks who get paid for sitting on the bench" (467 U.S. at 943), "perfectly illustrate[d]" the rationale supporting the "modern view" inasmuch as "the general contractor is 'paid' with immunity precisely because he performs a back-up function, without which the [workers' compensation] system would not operate . . . ." 2A A. Larson, *supra*, at 14-180.

[24] In fact, a bill introduced in the Seventh Session of the D.C. Council contained a provision to amend the 1979 Act that was similar to Congress' 1984 Amendment to the Longshore Act. However, no action was taken on that bill. Another bill containing the same provision was introduced into the Eighth Session of the D.C. Council, but it, too, has not been acted upon.

CONCLUSION

For the foregoing reasons, the Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 85-577

CLARENCE MEIGGS, *et al.*,
Appellants,

v.

ASSOCIATED BUILDERS, INC.,

and

PINEDA-HELLER ELECTRIC COMPANY, INC.,
Appellees.

Nos. 86-100 & 86-125

OMNI CONSTRUCTION, INC.,
Appellant,

v.

SIDNEY FEATHERSTONE, *et ux.*,

and

ANDREW S. APPLING, *et ux.*,
Appellees.

No. 86-185

KBR CORPORATION,
Appellant,

v.

HARRY HOBBS, *et al.*,
Appellees.

No. 86-257

TERRY FRAZIER, *et al.*,
Appellants,

v.

FAITH CONSTRUCTION COMPANY, *et al.*,
Appellees.

Appeals from the Superior Court of
the District of Columbia

(Hon. Susan Holmes-Winfield, Trial Judge in No. 85-577)

(Hon. Gladys Kessler, Trial Judge in Nos. 86-100 & 86-125)

(Hon. Frederick H. Weisberg, Trial Judge in No. 86-185)

(Hon. Curtis E. von Kann, Trial Judge in No. 86-257)

(Argued August 19, 1986 Decided July 18,1988)

Patrick M. Regan and *Marc Fiedler*, with whom *Joseph H. Koonz, Jr.*, *Roger C. Johnson*, and *Mark J. Brice*, were on the brief, for appellants Meiggs and Frazier.

Walter A. Smith, Jr., with whom *Vincent H. Cohen*, *Robert B. Cave*, and *David F. Grady* were on the brief, for amicus curiae Washington Metropolitan Area Transit Authority.

Ronald G. Guziak and *Keith M. Bonner* were on the brief for appellant Omni Construction, Inc.

Edwin A. Sheridan was on the brief for amicus curiae KBR Corporation.

James C. Gregg and *Jack E. Rossotti* were on the brief for appellee Associated Builders, Inc.

Geoffrey S. Gavett was on the brief for appellee Pineda-Heller Electric Company, Inc.

Peter J. Vangsnes, Robert P. Enderle, and *H. Vincent McKnight, Jr.,* were on the brief for appellees Featherstone, Appling and Hobbs.

Joseph P. Dyer and *John A. Sutherland, Jr.* were on the brief for appellee Faith Construction Company.

Before MACK, ROGERS and STEADMAN, *Associate Judges.*[1]

MACK, *Associate Judge*: These five separate appeals, consolidated for our consideration, present an identical issue for resolution: do sections 5 (a) and 5 (b) of the District of Columbia Workers' Compensation Act of 1979, 27 D.C. Reg. 2503, 2507-08 (1980) (as codified at D.C. Code § 36-304 (1981) (hereinafter "1979 Act"), grant general contractors immunity from tort liability in suits brought by injured employees of subcontractors, where the subcontractors have secured payment of workers' compensation to the employees? The general contractors, in claiming immunity, cite to the Supreme Court's decision in *Washington Metropolitan Area Transit Authority v. Johnson,* 467 U.S. 925 (1984), as binding and persuasive precedent. The injured employees rely primarily upon the plain language of the statute and legislative history of the 1979 Act. We hold that general contractors, under these circumstances, are not entitled to statutory immunity under the District of Columbia Workers' Compensation Act.

Since the issue here is purely one of law, it is unnecessary to recite in detail the facts peculiar to each case.

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[1] Associate Judge Steadman was selected as a member of the division to replace Senior Judge Nebeker, who withdrew from active judicial service on December 11, 1987.

Rather, it suffices to say that the plaintiffs[2] were employed by various subcontractors when they each sustained a work-related injury on a construction job site. The subcontractors, who had procured workers' compensation insurance for their employees, then secured the payment of such compensation to the injured plaintiffs who had each filed claims for benefits pursuant to the provisions of the Workers' Compensation Act of 1979. The injured plaintiffs thereafter brought independent negligence actions against, among others, the respective general contractors on the construction projects where their injuries were sustained. In the *Meiggs* and *Frazier* negligence suits, Judges Holmes-Winfield and Wertheim, respectively, entered summary judgment in favor of the general contractors on the basis of statutory immunity and the employees appealed. In *Hobbs*, *Appling* and *Featherstone*, Judges Weisberg and Kessler, respectively, determined that the statute did not bar suit and denied the general contractors' motions for summary judgment.[3] This court subsequently granted their applications to appeal the denial of such motions.

I.

The issue in this case arises as a result of the language in Section 5 (a)-(b) of the 1979 Act:

> (a) The liability of an *employer* prescribed in § 36-303 shall be exclusive and in place of all liability of such *employer* to the *employee* . . . .
>
> (b) The compensation to which an *employee* is entitled under this chapter shall constitute the *employ-*

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[2] We use the terms plaintiff(s) and employee(s) synonymously throughout this opinion. We have not overlooked the fact that certain plaintiffs in these actions are actually spouses of the injured employees.

[3] Judge Kessler decided both *Appling* and *Featherstone*.

ee's exclusive remedy against the *employer* . . . . [Emphasis added.]

In arguing that "employer" should be interpreted to include "general contractor" when the underlying statute has not imposed an absolute duty on the contractor to secure payment of compensation, the contractors cite *Washington Metropolitan Transit Authority v. Johnson, supra.* The employees, on the other hand, look for support to this court's decision in *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979), where we held that a general contractor is not an "employer" immune from liability under the provisions of the District of Columbia Worker's Compensation Act where the subcontractor secures insurance and pays compensation to the employee.

Johnson, like *DiNicola*, involved injuries to nonmaritime workers in the District of Columbia and therefore at issue in the case was the proper interpretation of the District of Columbia Workers' Compensation Act of 1928 (codified as amended at D.C. Code §§ 36-501 to -502 (1973) (hereinafter "1928 Act")). In *Johnson*, however, the Supreme Court made only a passing reference to the 1928 Act and then proceeded to interpret the Longshore and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424 (codified as amended at 33 U.S.C. § 901 to 950 (1982) (hereinafter "LHWCA")). The Court concluded that a general contractor is an employer for purposes of the LHWCA and therefore enjoys statutory immunity.

In our view, *Johnson* is not binding precedent in the instant appeals. While there is room for argument as to what law was the subject of the Supreme Court's interpretation in *Johnson*,[4] one thing is undisputed: the Su-

[4] It might be noted that the Supreme Court in *Johnson* never engaged in an analysis of what law governed the action nor did it consider whether the question raised was "local" or federal. Significantly, *Johnson* cites our decision in *DiNicola v. George Hyman Construction Co., supra,* without expressing any disapproval what-

preme Court *did not* interpret the District of Columbia Workers' Compensation Act of 1979. Equally clear is the fact that we are today called upon to interpret the 1979 Act. Since the principle of *stare decisis* has no application to a decision construing a different statute, this court is not bound by *Johnson*. On a question of purely local law, this court is undeniably the final arbiter. D.C. Code § 11-102 (1981) ("The highest court of the District of Columbia is the District of Columbia Court of Appeals."). *See also Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979) (D.C. Court of Appeals is "the final expositer of the local law of the District of Columbia."); *Reichman v. Franklin Simon Corp.*, 392 A.2d 112 (D.C. 1978).

Johnson also has very little, if any, persuasive value in the context of these cases. Shortly after the Supreme Court's decision in 1984, Congress passed amendments to the LHWCA with the express purpose of divesting *Johnson* of any past or subsequent precedential effect. Congress concluded that *Johnson* did "not comport with the legislative intent of the [LHWCA] nor its interpretation from 1927 through 1983." H.R. CONF. REP. No. 1027, 98th Cong., 2nd Sess. 24 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2771, 2774. This repudiation of the *Johnson* interpretation by the Congress is telling. Significantly, the reasoning underlying *Johnson* had been rejected by our own court in *DiNicola*, *supra*, just six months before the Council of the District of Columbia passed the 1979 legislation.

II.

Freed of the encumbrances flowing from contradictory judicial interpretations,[5] and strained reliances on *John-*

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soever of its reasoning or result. *See Johnson*, *supra*, 467 U.S. at 933-34. We reserve for another day a comprehensive development of this issue.

[5] In addition to the disagreement in the five present cases, there is a comparable division in the lower federal courts of the District

son, the issue is a simple one. Who is an employer immune from tort liability under the provisions of the District of Columbia Workers' Compensation Act of 1979?

The starting point for analysis is, of course, the language of the statute itself. The statute makes the meaning of "employer" abundantly clear. Under the Act:

> "Employer" includes any individual, firm, association, or corporation, or receiver, or trustee of the same, or the legal representative of a deceased employer, using *the service of another for pay* within the District of Columbia.

D.C. Code § 36-301 (10) (1981) (emphasis added).[6] A reasonable reading of the statute leads to the conclusion that the "service of another" to which the definition refers is the service of an "employee." The Act defines employee:

> "Employee" includes every person, including a minor, in the service of another *under any contract of hire or apprenticeship*, written or implied, in the District of Columbia . . . .

Id. § 36-301 (9) (emphasis added). Thus, an employer and its employee enjoy a written or implied contractual

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of Columbia. In *Ford v. United States*, No. 84-3082 (D.D.C. 1985) (memorandum order), and *Stokes v. George Hyman Construction Co.*, No. 84-1418 (D.D.C. 1985) (memorandum order), the district court for the District of Columbia held that a general contractor is entitled to immunity. In *Allen v. United States*, 625 F. Supp. 841 (D.D.C. 1986), the court concluded that a general contractor is not entitled to immunity.

[6] Justice Marshall, writing for the majority in *Washington Metropolitan Area Transit Authority v. Johnson*, *supra*, pointed out that the immunity provision of the LHWCA "speaks in terms of 'an employer' and, at least as far as the employees of subcontractors are concerned, a general contractor does not act as an employer." *Johnson*, *supra*, 467 U.S. at 933.

relationship under which the services of the employee are exchanged for payment from the employer.

In the consolidated cases here, the general contractors and plaintiffs were not involved in an employer/employee relationship. For example, in *Meiggs*, Associated Builders did not hire Meiggs, did not pay Meiggs, and held no contract whatsoever with Meiggs. Likewise, Meiggs did not render service for Associated Builders. Rather Meiggs rendered service for Pineda-Heller, who hired Meiggs, paid Meiggs and exercised exclusive control over him. Pineda-Heller was Meiggs' employer. Under a literal interpretation of the immunity provision, no immunity ran to Associated Builders in regard to Meiggs.[7] Indeed, in some jurisdictions, the inquiry would be at an end and immunity would simply be rejected. *Fiore v. Royal Painting Co.*, 398 So. 2d 863, 865 (Fla. Dist. Ct. App. 1981); *Sweezey v. Arc Electrical Construction Co.*, 295 N.Y. 306, 310-11, 67 N.E.2d 369, 370-71 (1946).

Questions regarding the literal interpretation of the meaning of the word "employer" in the immunity provision arise only out of the interplay between the immunity provision and the liability provision:

> (b) Every employer subject to this chapter shall be liable for compensation for injury or death . . . .
>
> (c) In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor *unless* the subcontractor has secured such payment.

Id. at § 36-303 (b)-(c) (emphasis added). Under these provisions, a general contractor incurs a secondary liability to secure payment of workers' compensation when a subcontractor has not secured payment. Consequently, if

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[7] This reasoning applies with equal force to the other decisions on appeal.

a subcontractor defaults, a general contractor can argue that unless it is *constructively* deemed the "employer" of the subcontractor's employees for purposes of the immunity provision, it will incur double liability: workers' compensation and common law tort liability. The argument continues that in light of results unfair to the general contractor, the literal interpretation of the meaning of the word "employer" in the immunity provision (and all other provisions in the 1979 Act) must give way.

Such an argument, however, has force only when the general contractor is legally required to secure payment of compensation to a subcontractor's employees. Otherwise, double liability is not a possibility. Indeed, double liability to Associated Builders was not a possibility here. The subcontractor, Pineda-Heller, "secured" payment of compensation to its employee Meiggs and thus fulfilled its statutory obligation under § 36-303 (b)-(c). Additionally, Associated Builders did not "secure" payment of compensation to Meiggs under its contingent § 36-303 (c) duty. Consequently, double liability was not possible, and no reason has been advanced nor exists for engaging in the legal fiction of constructively deeming Associated Builders Meiggs' "employer" when it is clear Pineda-Heller is Meiggs' *actual* employer. This is likewise true of the other subcontractors here since none defaulted on their statutory obligations.

Thus, even if it is sometimes appropriate to constructively deem a general contractor the "employer" of a person clearly not its employee, the *most* that follows is that such creative statutory interpretation is appropriate *only* when the actual employer—the subcontractor —defaults on its statutory obligation, and the general contractor steps in to secure payment. *See Johnson, supra*, 467 U.S. at 945 (Rehnquist, J., dissenting).

This conclusion is buttressed by looking at the use of "employer" in the remainder of the 1979 Act. The word

"employer" is used throughout the Act. Section 36-307 specifies the medical services the "employer" is required to furnish; § 36-313 requires employees to give their "employers" notice of injuries; and § 36-335 (b) requires employees to assign their rights to third party damages to their "employers" if the employee accepts workers' compensation. If, regardless of subcontractor default, the general contractor were deemed the "employer" for all these purposes, notice would twice be required, "[b]oth the contractor and the subcontractor would be directed to make the payments required by [§ 36-307], and both would simultaneously be entitled to the assignment of the injured worker's right to recover damages from third parties under § [36-335 (b)]. Everything directed by the Act would be done in duplicate." *Johnson, supra*, 467 U.S. at 944-45 (Rehnquist, J., dissenting). If, however, the general contractor were deemed the "employer" of the subcontractor's employees only when the subcontractor defaulted, no duplication would occur. In the appeals before us, it is undisputed that Associated Builders, Faith Construction Co. and the other corporate defendants were "contractors" within the meaning of D.C. Code § 36-303 (c) (1981).[8] It should likewise be clear that they are "third persons"—not contractors within the meaning of that provision who can be equated with the status of immunized employers by virtue of the failure of the subcontractors to secure payment.

III

A.

Not only is our conclusion consistent with the plain language and overall structure of the 1979 Act, it is also

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[8] In *Johnson*, the Supreme Court relied on the lower courts' findings that WMATA was a "contractor" within the meaning of the liability provisions. *Johnson, supra*, 467 U.S. at 924 n.5. There "WMATA elected to assume responsibility for securing workers' compensation insurance for all Metro construction employees." *Id.* at 929.

consistent with the intent of the Council of the District of Columbia when it enacted this legislation.

Just recently, this court reiterated the local adaptation of what is a universally recognized principle of statutory construction:

> When a local provision is borrowed directly from a federal statute, the Council [of the District of Columbia] is presumed to have borrowed the judicial construction thereof as well.

Hughes v. District of Columbia Department of Employment Services, 498 A.2d 567, 571 n.8 (D.C. 1985) (citing *Whitt v. District of Columbia*, 413 A.2d 1301, 1303-04 (D.C. 1980)). This "local" version takes its origin from the cardinal rule of statutory construction that when a legislature adopts a statute that is modeled after one in effect in another jurisdiction, the legislature is deemed to have adopted as well the judicial constructions of the statute in the jurisdiction in which it originated. *Yates v. United States*, 354 U.S. 298, 309 (1957); *Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944); *see generally* 2A SUTHERLAND, STATUTORY CONSTRUCTION § 51.02 (Sands 4th ed. 1984). It is particularly appropriate that this presumption be applied in this controversy, where the prior judicial constructions "adopted" are our *own*; that is, our interpretations of provisions of acts of Congress which are incorporated verbatim into the Council's new legislation.

Of course, as this court has emphasized, this rule applies only to such judicial constructions as have been placed on the "borrowed" statute *prior* to its enactment by the jurisdiction adopting it. *Whitt*, *supra*, 413 A.2d at 1303-04. Any subsequent interpretations by this court will be binding on us; any subsequent interpretations by another court carry no precedential value.

It is important, therefore, to review the legal landscape facing the Council when it debated and ultimately

enacted the 1979 Act. At that time, three cases had explicitly interpreted the immunity provision of the federal LHWCA as it applied to the District of Columbia through the 1928 incorporation. In *Liberty Mutual Insurance Co. v. Goode Construction Co.*, 97 F. Supp. 316 (E.D. Va. 1951), a federal court held that a general contractor was a "third person" under the 1928 Act and thus could be sued by the subcontractor's employee. In *Liberty Mutual*, the subcontractor carried workers' compensation insurance. The court observed that the employee

> made no contract of employment with the defendant [the general contractor], that his contract was with the subcontractor, that the terms of his contract did not foreclose his right against anyone save his employer, and that his agreement is not to be curtailed *except by law or his consent and neither has done so.*

Id. at 317 (emphasis added).

Subsequently, in *Thomas v. George Hyman Construction Co.*, 173 F. Supp. 381 (D.D.C. 1959), the federal District Court for the District of Columbia, which at the time had jurisdiction over local matters, denied immunity to a general contractor where both the general contractor and the subcontractor had secured workers' compensation insurance. The court eloquently set forth the rationale behind its decision to give the statute its plain language interpretation:

> The law requires [the general contractor] to carry insurance only if the subcontractor fails to do so. In such a contingency, the general contractor may well be free of all other liability if he in fact carried such insurance. He may not, however, voluntarily take out insurance that the law does not require and thereby secure freedom from liability for negligence. . . . Release from common law liability is a benefit accruing from carrying compensation insurance only in case the law imposes a duty to do so. One may

> not escape from such liability by taking out insurance that the law does not require.

Id. at 383.

Finally, in *DiNicola v. George Hyman Construction Co.*, *supra*, this court reaffirmed the principles enunciated in *Liberty Mutual* and *Thomas v. George Hyman Construction Co.* The *DiNicola* court held that a general contractor is not an "employer" immune from liability under the provisions of the Act where the subcontractor secures insurance and pays compensation to the employee. *Id.* at 672. The *DiNicola* court, not satisfied with simply supporting its interpretation by reference to prior interpretations of the 1928 Act, set forth the substantial body of federal and state cases supporting its plain language interpretation. Citing those cases, the *DiNicola* court found that "[t]he majority of courts interpreting statutes similar to the [LHWCA] have reached similar results" to the one the court reached. *Id.* at 674.[9]

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[9] This comports with the Fifth Circuit's 1967 description of the general terrain:

> The two main lines of decision—(1) general contractor may be sued, (2) the general contractor may not be sued—arise out of compensation statutes which, in turn, follow two principal divisions. In the first are those statutes which require the general employer or general contractor to see that any and all independent contractors or subcontractors carry compensation insurance or suffer statutory liability for compensation to the employees of the subcontractors. In the second category are those which directly impose liability on the general employer or the general contractor, as the case may be, for injuries to the employees of any independent contractors or subcontractors. . . . Under the first type of statute, the state case law generally denies to the general contractor the employer's immunity and permits third party suit against him. Under statutes of the second kind imposing a direct liability, the cases with a good deal of good sense regard the general contractor as the vicarious employer and extend the employer's immunity to him.

Probst v. Southern Stevedoring Co., 379 F.2d 763, 765-66 (5th Cir. 1967) (footnote omitted).

Two other cases, not directly on point, give further evidence of the substantive body of law facing the Council when it engaged in the difficult task of drafting a workers' compensation statute for the District. In *Lindler v. District of Columbia*, 164 U.S. App. D.C. 35, 502 F.2d 495 (1974), the United States Court of Appeals for the District of Columbia Circuit held that the Workers' Compensation Act of 1928 did not bar suit against the District of Columbia by employees of *independent* contractors hired by the District for municipal projects. Furthermore, in *Martin v. George Hyman Construction Co.*, 395 A.2d 63 (D.C. 1978), this court assumed, without discussion, that an injured employee of a subcontractor was permitted to maintain a negligence action against a general contractor.

Thus, on May 6, 1980, when the Council passed the 1979 Act, every case interpreting the immunity provisions of the 1928 Act unambiguously rejected contractor immunity if the subcontractor fulfilled its obligation to secure payment of worker's compensation. Indeed, *DiNicola* was one of three identical judicial constructions of the immunity provision, two of which were on the books long before the 1979 bill was ever introduced.

B.

The intent of the Council of the District of Columbia can also be inferred from the affirmative legislative record surrounding the passage of the 1979 Act. When the Council drafted the 1979 Act, it explicitly reviewed the Maryland Workers' Compensation Act. *See* COMMITTEE ON HOUSING AND ECONOMIC DEVELOPMENT OF THE COUNCIL OF THE DISTRICT OF COLUMBIA, REPORT ON BILL NO. 3-106: THE "DISTRICT OF COLUMBIA WORKERS' COMPENSATION ACT OF 1979" at 4, 6, 10, 13 (January 29, 1980). The Maryland Act includes a provision subjecting a principal contractor to an absolute duty to secure workers' compensation. MD. ANN. CODE art. 101, § 62 (1985). Moreover, it deems a principal contractor an

employer for purposes of the Act: "[I]n the application of this article, reference to the principal contractor shall be substituted for reference to the employer." *Id.* Despite the fact that the Council modeled some of the 1979 Act provisions after those in the Maryland Act, *compare* D.C. Code § 36-308 to -311 (1981) *with* MD. ANN. CODE art. 101, § 36 (1981), it did not engraft onto our 1979 Act the provision explicitly substituting the words "principal contractor" for the word "employer." Rather, it chose to retain the language of the 1928 Act which granted immunity only to "employers."

IV.

Our conclusion is also consistent with the philosophy underlying workers' compensation schemes. That philosophy has commonly been described as a *quid pro quo* on both sides: in return for the purchase of insurance against job-related injuries, the employer receives tort immunity; in return for giving up the right to sue the employer, the employee receives swift and sure benefits. Interpretation of the 1979 Act to confer immunity on general contractors would transform the underlying philosophy of workers' compensation into a *duo quidem pro sole unum quo.* The employee would be required to give up at least two immunities—one to the general contractor and one to the subcontractor—for the price of one. The bargain becomes more unattractive with every "sub" prefixed to the word "contractor." Employees unfortunate enough to be employed by a sub-sub-sub-subcontractor find that, in addition to the employer, four possibly negligent actors are immune from liability. *See Johnson, supra,* 467 U.S. at 927 n.3, 940 n.14 (subcontractors and sub-subcontractors of voluntarily insured general contractors are also immune).

Principles of statutory construction further reinforce our conclusion. The first of these principles is that statutes are to be strictly construed against the abrogation of common law rights unless that intent is clearly ex-

pressed. *Dell v. Department of Employment Services*, 499 A.2d 102, 107 (D.C. 1985) (citing *Shaw v. Railroad Co.*, 101 U.S. (11 Otto) 557, 565 (1879)). The second is that workers' compensation statutes are to be construed liberally in favor of the worker in order for them to achieve their humane purpose. *Ferreira v. Department of Employment Services*, 531 A.2d 651, 665 (D.C. 1987); *J.V. Vozzolo, Inc. v. Britton*, 126 U.S. App. D.C. 259, 262, 377 F.2d 144, 147 (1967).

V.

We would also point out that our analysis does not facilitate double recovery by an employee. The Council expressly wrote protections against such "windfalls" into the 1979 Act.

Under § 36-335, if an employee believes his injury is the result of the negligence of a third person, the employee may engage in two courses of conduct after he accepts a workers' compensation award from his employer.[10] He may do nothing for six months, in which case his right to recovery against the third person is automatically assigned to his employer. *Id.* at § 36-335 (b). The employer may then either institute proceedings for the recovery of damages or may compromise with the third person with or without instituting proceedings. *Id.* at § 36-335 (d). In any case, if damages are recovered from a third person, the employer is entitled to retain such amount as covers all its costs in instituting the proceedings and all amounts paid and payable to the employee as workers' compensation. *Id.* at § 36-335 (e) (1). The employer is also entitled to twenty percent of the excess of recovery over costs, thus leaving the employee with eighty percent of what his common law tort remedy would have netted. *Id.* at § 36-335 (e) (2). Clearly, such a result is not a "windfall" to the employee.

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[10] The options available to the personal representative of a decedent are distinct. D.C. Code § 36-335 (c). That provision is not relevant to these appeals, where injury, not death, occurred.

The second course of conduct open to the employee is to commence proceedings against the "third person" within six months after acceptance of the workers' compensation award from the employer. *Id.* at § 36-335 (b). If the employee recovers civil damages in the subsequent proceedings, the employer is "required to pay" to the employee *only for* the amount by which the workers' compensation award *exceeds* the civil damage award. *Id.* at § 36-335 (f). In other words, if the civil damage award exceeds the workers' compensation award, the employer is not required to tender payment of any workers' compensation benefits. Here again, double recovery is not a possibility. The most an employee receives is the common law tort remedy from a third party who has been adjudicated negligent.

Section 36-335 of the Workers' Compensation Act of 1979 is not an accidental feature of the legislation. It reflects a conscious legislative policy to permit an employee to pursue his full common law remedy when the employee believes that the negligence of a third person caused his injury. Here again, the language of § 36-335 is clear and unambiguous. It speaks in terms of employers and employees. Furthermore, it specifically defines "third persons" as persons other than:

> the employer, or any collective-bargaining agent of the employer's employees, and any employee, officer, director, or agent of such employer, insurer, or collective-bargaining agent.

D.C. Code § 36-304 (b) (incorporated by reference in § 36-335 (a)). Clearly, "general contractor" is not included in this list of excluded "third persons."

Accordingly, the orders in *Featherstone*, *Appling* and *Hobbs* are affirmed and the judgments in *Meiggs* and *Frazier* are reversed.

So ordered.

Associate Judge STEADMAN concurs in the result.

APPENDIX B

SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

C.A. No. 2563-84

CLARENCE MEIGGS, *et al.*,
Plaintiff

vs.

ASSOCIATED BUILDERS, INC.,
Defendant & Third-Party Plaintiff

vs.

PINEDA/HELLER ELECTRIC CO., INC., JOINT VENTURE,
Third-Party Defendant.

ORDER

Upon consideration of the Motion for Summary Judgment filed herein by and on behalf of defendant, Associated Builders, Inc., against the plaintiff, Clarence Meiggs, of the Statement of Material Facts as to Which There is No Genuine Issue, and of the Memorandum of Points and Authorities filed in support thereof, and of Superior Court Rules of Civil Procedure 56(b), and of the record herein, it is, by the Court, this 1st day of May, 1985,

ORDERED, that said Motion be, and the same hereby is granted and that judgment is hereby entered in favor

of the defendant Associated Builders Inc., against plaintiff, Clarence Meiggs.

/s/ Susan R. Holmes
Judge

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APPENDIX C

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Civil No. 6602-84

TERRY FRAZIER, *et al.*
Plaintiffs

v.

FAITH CONSTRUCTION COMPANY, *et al.*,
Defendants.

ORDER

Defendant has moved for summary judgment, contending that as a matter of law it has no liability due to sections 4(c) and 5(a) of the D.C. Worker's Compensation Act (DCWCA), D.C. Code §§ 36-303(c) and 36-304(a) (1981), in light of *WMATA v. Johnson*, —— U.S. ——, 104 S. Ct. 2827 (1984). Plaintiff's opposition argues that *Johnson* construes only the Longshoremen's and Harbor Workers' Compensation Act of 1927 (LHWCA), 33 U.S.C. §§ 901-950 (1978) and thus does not control our interpretation of the DCWCA.

The Court agrees with defendant and finds *Johnson* persuasive for three reasons. First, the federal statute construed by the Supreme Court in *Johnson* (prior to the 1984 Amendments to the LHWCA, Pub. L. No. 98-426, 98 Stat. 1641, (1984)) is identical in all material respects to the provisions of the DCWCA here at issue.

Second, plaintiff has identified nothing in the respective legislative histories of the two statutes to warrant differing interpretations. Third, and most compelling, the D.C. Court of Appeals has just recently found *Johnson* persuasive in construing workers' compensation claims brought in this jurisdiction under the local act. *See O'Connell v. Maryland Steel Erectors, Inc.*, No. 82-1486 (D.C. July 5, 1985), *approving In Re Metro Subway Accident Referral*, Misc. 82-306 (D.D.C. Dec. 18, 1984); *see also Montag v. Fischbach & Moore Corp.*, C.A. No. 4634-83 (D.C. Super. Ct. Feb. 13, 1985).

Accordingly, defendant's motion for summary judgment is granted on the conditions that:

(1) Within thirty days of the date of this Order, defendant file documentary proof that at the time of the accident in question defendant was insured in compliance with D.C. Code § 36-303(c) (1981), or alternatively that the parties file a stipulation to the same effect; and

(2) that absent such stipulation, plaintiff has not within sixty days of the date of this Order shown that there is a genuine issue as to whether defendant had so complied with D.C. Code § 36-303(c) (1981).

The Court notes that although defendant represents without contradiction in its pre-trial statement that it "did provide a secondary workmen's compensation coverage," the proof on this point is insufficiently specific, particularly given § 5 of the construction contract appended to defendant's motion. The only other relevant reference in the present record is defendant's answer to Interrogatory No. 34, which lists Safeco Insurance Company as an indemnifier but does not provide enough information to demonstrate compliance with D.C. Code § 36-303(c) (1981).

SO ORDERED.

July 23, 1985

Date

/s/ Ronald P. Wertheim
JUDGE RONALD P. WERTHEIM

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APPENDIX D

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

C.A. No. 803-84

HARRY HOBBS, SHELBY HOBBS,
Plaintiffs

v.

KBR CORPORATION,
Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the court on defendant's motion for summary judgment and plaintiffs' opposition thereto. The question presented by defendant's motion is whether, under the District of Columbia Workers' Compensation Act of 1979 (hereinafter, the 1979 Act), a general contractor may be sued in tort by the injured employee of its subcontractor, where the employee has received compensation for his injury under his employer's workers' compensation coverage.[1] The answer to this question turns on a determination of what the District of Columbia

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[1] This question is currently pending before the United States Court of Appeals for the District of Columbia Circuit in *Stokes* v. *George Hyman Construction Company*, No. 85-5147. This court recently decided a related question in *Peake* v. *Donohoe Construction Company, Inc.*, C.A. No. 15231-82 (motion for summary judgment granted, October 24, 1985). *Peake*, however, involved a claim arising under the Workmen's Compensation Act of 1928, and accordingly the analysis of the question presented in that case necessarily differs from the correct analysis of the question presented here.

Council intended when it wrote into the 1979 Act language imported from the Longshoremen's and Harbor Workers' Compensation Act of 1927 (hereinafter, the Longshoremen's Act), which had been the prior law in the District of Columbia by virtue of the District of Columbia Workmen's Compensation Act of 1928 (hereinafter, the 1928 Act).

The material facts are not in dispute. On or about December 1, 1982, plaintiff Harry Hobbs was injured on the job while working for his employer, Benson & Bowles, a subcontractor of defendant KBR Corporation. Thereafter, plaintiff obtained workers' compensation benefits from his employer under the employer's compensation coverage. Plaintiffs also filed this action against KBR Corporation, alleging that its negligence was the cause of Mr. Hobbs' injury.

There is no dispute that the defendant's immunity from suit, *vel non*, is governed by the provisions of the 1979 Act. The Act was passed by the Council of the District of Columbia and became law on July 1, 1980. After an unsuccessful lawsuit challenging the authority of the Council to legislate in this area, the Act finally went into effect on July 24, 1982. It governs all claims arising after that date. *Garrett* v. *Washington Air Compressor*, 466 A.2d 462 (D.C. 1983). The relevant sections of the 1979 Act, 36 D.C. Code §§ 303, 304, provide:

> Section 36-303. Coverage.
>
> (a) . . .
>
> (b) Every employer subject to this chapter shall be liable for compensation for injury or death without regard to locality of injury or to fault as a cause of the injury or death.
>
> (c) In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of

the subcontractor unless the subcontractor has secured such payment.

Section 36-304. Exclusiveness of liability and remedy.

(a) The liability of an employer prescribed in § 36-303 shall be exclusive and in place of all liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law on account of such injury or death.

(b) The compensation to which an employee is entitled under this chapter shall constitute the employee's exclusive remedy against the employer . . . for any illness, injury, or death arising out of and in the course of his employment: Provided, that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to claim compensation under this chapter, or to maintain an action at law for damages on account of such injury or death. . . .

The language of these provisions was borrowed almost verbatim from the analogous provisions of the Longshoremen's Act. In 1980, those sections, as codified, provided:

33 U.S.C. § 904. Liability for compensation.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

33 U.S.C. § 905. Exclusiveness of liability.

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place

> of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law . . . on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to claim compensation under the chapter, or to maintain an action at law . . . for damages on account of such injury or death. . . .

Before 1980, the precise question presented by this case had arisen under the 1928 Act and the Longshoremen's Act. In *DiNicola* v. *George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979), the Court construed sections 4(a) and 5(a) of the Longshoremen's Act and held that where the employer is a subcontractor who secures payment of compensation to its injured employee, only the subcontractor, and not the general contractor, is immune from suit by the employee. *See also Thomas* v. *George Hyman Construction Co.*, 173 F. Supp. 381 (D.D.C. 1959). *DiNicola* was the law on this point until 1984 when, in a District of Columbia case, the Supreme Court held that under sections 4(a) and 5(a) of the Longshoremen's Act a general contractor is immune from suit by the injured employee of its subcontractor as long as the general contractor has not failed to secure payment of compensation to the employee after a default by the subcontractor. *Washington Metropolitan Area Transit Authority* (WMATA) v. *Johnson*, 104 S. Ct. 2827 (1984). The majority in *WMATA* v. *Johnson* recognized that to construe the statute to include a general contractor as the "employer" of the injured employee of the subcontractor was not entirely consistent with the ordinary definition of an employer or with the plain language of the statute. 104 S. Ct. at 2833. Nonetheless, the Court concluded, over a spirited dissent joined by three Justices, that its construction was consistent with the

intent of Congress and better served the purposes of the overall statutory scheme for workers' compensation.[2]

Defendant argues that this court ought to ignore *DiNicola* and follow *WMATA* v. *Johnson* because the Supreme Court's construction of sections 4(a) and 5(a) of the Longshoremen's Act is dispositive and because, in defendant's view, *WMATA* v. *Johnson* represents the modern trend in workers' compensation law and makes good sense as a matter of social and economic policy. The problem with defendant's argument, even if one were to accept all of its premises, is that it completely misconceives the proper role of this court. The question here is a pure question of statutory construction. The question is not whether the reasoning of the Supreme Court in *WMATA* v. *Johnson* is better than the reasoning of the Court in *DiNicola*. Nor is the question whether the Council in 1980 could have made general contractors immune from suit or, for that matter, whether it should have. The question is whether it did. That question

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[2] Apparently the Congress did not agree. When the Congress saw what the Supreme Court had done in *WMATA* v. *Johnson*, it immediately amended sections 4(a) and 5(a) of the Longshoremen's Act to make it clear that a general contractor was not immune from suit by the injured employee of its subcontractor unless it was actually required to secure payment of compensation to the employee after a default by the subcontractor. Longshoremen and Harborworkers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639. The 1984 amendments to the Longshoremen's Act are not relevant to the proper disposition of this case for at least three reasons: (1) this case arises under the 1979 Act, not the 1928 Act which incorporated the Longshoremen's Act; (2) Congress did not amend even the 1928 Act, which was repealed and replaced by the 1979 Act before the amendments were passed (*O'Connell* v. *Maryland Steel Erectors, Inc.*, D.C. App. No. 82-1486, dec. July 5, 1985, *pet. for reh. en banc denied* October 21, 1985); and (3) an act of Congress in 1984 could not possibly be relevant to a proper determination of the intent of the District of Columbia Council in 1980 when it passed the 1979 Act. The 1984 amendments do, however, undermine the precedential value of *WMATA* v. *Johnson*, on which defendant principally relies.

must be answered by reference to the ordinary rules of statutory construction.

The starting place for any question of statutory construction is the language of the statute itself. *Washington* v. *United States*, 498 A.2d 247, 248 (D.C. 1985); *Varela* v. *Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 64 (D.C. 1980) (*en banc*). As is apparent from the conflicting decisions in *DiNicola* and *WMATA* v. *Johnson*, the words of this statute will admit of more than one interpretation. It is at least arguable that the *DiNicola* Court hewed more closely to the statutory language than the Supreme Court. Indeed, even the majority in *WMATA* v. *Johnson* admitted that its reading was not entirely faithful to the words of the statute.

More importantly, when the Council acted in 1980, the *only* construction of sections 4(a) and 5(a) of the Longshoremen's Act was the *DiNicola* rule—no immunity.[3] The Supreme Court was of course free to reach a different result; but it did so in 1984, four years after the Council had enacted its new Workers' Compensation Act for the District of Columbia. Although the new Act borrowed the language from the Longshoremen's Act, it does not follow that *later* interpretations of the Longshoremen's Act become relevant to a determination of the Council's legislative intent.[4] Instead, the correct rule of

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[3] Before *WMATA* v. *Johnson*, the only Circuit to have passed on this question also sided with *DiNicola*. *Probst* v. *Southern Stevedoring Co.*, 379 F.2d 763 (5th Cir. 1967).

[4] Defendant argues that because sections 303 and 304 of the 1979 Act come directly from sections 4(a) and 5(a) of the Longshoremen's Act, and *WMATA* v. *Johnson* is the "last word" on the meaning of sections 4(a) and 5(a), this court should follow the decision of the Supreme Court in its construction of sections 303 and 304. It is true that subsequent judicial constructions of a predecessor statute may be helpful in construing a successor statute, where there had been no authoritive judicial construction of the predecessor statute in existence at the time the successor statute was enacted. *See* 82 C.J.S. *Statutes* § 373(b) (1953); 2A Suther-

statutory construction is that when a legislature enacts a statute taken verbatim or substantially verbatim from the statute of another jurisdiction, it is deemed to have adopted *prior* constructions of the statute in the jurisdiction in which it originated. 2A Sutherland, Statutory Construction § 52.02, 322-24 (4th ed. 1984); *Hughes* v. *District of Columbia Department of Employment Services*, D.C. App. No. 84-264, dec. Oct. 4, 1985, slip. op. at 8 n.8; *cf. Whitt* v. *District of Columbia*, 413 A.2d 1301, 1304 (D.C. 1980).[5] The presumptive force of the rule is even stronger where, as here, a legislature borrows from a statute that was previously construed authoritatively by the highest court in its own jurisdiction. It is highly improbable that in 1980, when the Council imported sections 4(a) and 5(a) of the Longshoremen's Act into its new Workers' Compensation Act, it paid no attention to

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land, Statutory Construction § 52.02, 322-24 (4th ed. 1984); *cf. Hawley* v. *Hawley*, 72 App. D.C. 376, 380, 114 F.2d 745, 749 (1940). But where, as here, the predecessor statute had been authoritatively construed by the highest court in the jurisdiction at the time the successor statute was enacted, a subsequent judicial construction of the predecessor statute—even by the Supreme Court—which effectively overrules the construction of the statute given in the earlier case, is of no value in determining the intent of the legislature when it enacted the successor statute.

[5] Coincidentally, one of the clearest statements of the rule appears in *Hartford Accident & Indemnity Co.* v. *Hoage*, 66 App. D.C. 154, 156, 85 F.2d 411, 413 (1936), a case which construed the Longshoremen's Act in light of its own historic origins in the workers' compensation statutes of New York:

> The Longshoremen's Act followed in the main the Workmen's Compensation Law of the State of New York. It is familiar law that whenever Congress, in legislating for the District of Columbia, has borrowed from the statutes of a state provisions which have received in that state a known and settled construction *before* their enactment by Congress, that construction will be deemed to have been adopted by Congress together with the text which it expounded, and the provisions will be construed as they were understood in the State. (emphasis in original, footnotes and citations omitted).

the construction of those same provisions by the District of Columbia Court of Appeals in 1979.[6] If it thought that *DiNicola* made bad law or bad policy—as defendant asserts here—the Council could easily have drafted a statute consistent with that position. That it did not do so, and instead took the language virtually verbatim from the Longshoremen's Act, is strong evidence of its intent to adopt the *DiNicola* rule.

Neither party has cited any legislative history of the 1979 Act that adds very much to the analysis of the issue presented by this case. The legislative history does demonstrate that the Council was borrowing heavily from the Longshoremen's Act, departing only where necessary to serve a particular local purpose. Where there were departures, the Committee Report explained the changes, and the reasons for them. In its discussion of sections 4 and 5 of the new Act, which were taken from sections 4(a) and 5(a) of the Longshoremen's Act, the Committee Report makes note of certain changes—not relevant to the issue presented here—but says nothing at all reflecting an intent to change the *DiNicola* rule on immunity of general contractors. *See* Council of the District of Columbia, Report of the Committee on Housing and Economic Development, Bill 3-106, January 29, 1980, at 10, 13-14. From its silence, it is reasonable to conclude that the Council intended to carry forward into Sections 4 and 5 of the new Act the construction of sections 4(a) and 5(a) of the Longshoremen's Act by the Court in *DiNicola*.

The correct application of the rules of statutory construction lead to but one conclusion: under the 1979 Act a general contractor is not immune from suit by an in-

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[6] Even though *DiNicola* involved an interpretation of the Longshoremen's Act, the Court in *DiNicola* was construing local law. *District of Columbia* v. *Greater Washington Central Labor Council, AFL-CIO*, 442 A.2d 110, 116 (D.C. 1982), and cases cited therein.

jured employee of its subcontractor unless the general contractor secures the payment of statutory compensation to the injured employee after the subcontractor fails to secure such compensation. Because in this case the subcontractor secured the payment of compensation to its employee, the general contractor is not immune from suit. Accordingly, it is this 19th day of November, 1985

ORDERED that defendant's motion for summary judgment be, and it hereby is, denied.

/s/ Judge Frederick H. Weisberg
JUDGE FREDERICK H. WEISBERG
(Signed in Chambers)

November 19, 1985
Date

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APPENDIX E

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 85-577

CLARENCE MEIGGS, *et al.*,
Appellants,

v.

ASSOCIATED BUILDERS, INC. AND
PINEDA-HELLER ELECTRIC COMPANY, INC.,
Appellees.

CA 2563-84

No. 86-100

OMNI CONSTRUCTION, INC.,
Appellant,

v.

SIDNEY FEATHERSTONE, *et ux.*,
Appellees.

CA 4031-84

No. 86-125

OMNI CONSTRUCTION, INC.,
Appellant,

v.

ANDREW S. APPLING, *et ux.*,
Appellees.

CA 4030-84

No. 86-185

KBR CORPORATION,
Appellant,

v.

HARRY HOBBS, *et al.*,
Appellees.

CA 803-84

No. 86-257

TERRY FRAZIER, *et al.*,
Appellants,

v.

FAITH CONSTRUCTION COMPANY, *et al.*,
Appellees.

CA 6602-84

On Appeal from the Superior Court
of the District of Columbia
Civil Division

Before: MACK, ROGERS and STEADMAN,* *Associate Judges.*

JUDGMENT

This cause came on to be heard on the transcript of record, the briefs filed, and was argued by counsel. On

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* Associate Judge Steadman was selected as a member of the division to replace Senior Judge Nebeker, who withdrew from active judicial service on December 11, 1987.

consideration whereof, and for the reasons set forth in the opinion filed this date, it is now hereby

ORDERED and ADJUDGED by this court that the orders on appeal in Nos. 86-100, 86-125 and 86-185 are affirmed. It is

FURTHER ORDERED and ADJUDGED that the judgments on appeal in Nos. 85-577 and 86-257 are reversed.

For the Court:

/s/ R. B. Hoffman
RICHARD B. HOFFMAN
Clerk

Dated: July 18, 1988.

Opinion per Associate Judge Julia Cooper Mack.

APPENDIX F

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 85-543

SAMUEL ESTEP, *et al.*,
Appellants,

v.

CONSTRUCTION GENERAL, INC., *et al.*,
Appellees.

CA126-81

No. 85-577

CLARENCE MEIGGS, *et al.*,
Appellants,

v.

ASSOCIATE BUILDERS, *et al.*,
Appellees.

CA2563-84

No. 86-100

OMNI CONSTRUCTION, INC.,
Appellant,

v.

SIDNEY FEATHERSTONE, *et ux.*,
Appellees.

CA4031-84

No. 86-125

OMNI CONSTRUCTION, INC.,
Appellant,

v.

ANDREW A. APPLING, *et ux.*,
Appellees.

CA4030-84

No. 86-185

KBR CORPORATION,
Appellant,

v.

HARRY HOBBS, *et al.*,
Appellees.

CA803-84

No. 86-257

TERRY FRAZIER, *et al.*,
Appellants,

v.

FAITH CONSTRUCTION COMPANY, *et al.*,
Appellees.

CA6602-84

Before: * ROGERS, *Chief Judge*; * MACK, NEWMAN, FERREN, BELSON, TERRY, * STEADMAN, and SCHWELB, *Associate Judges.*

ORDER

[Filed Jan. 18, 1989]

On consideration of appellants' petition in no. 85-543 for rehearing en banc, and the responses thereto; and it appearing that the majority of the judges of this court has not voted to grant the petition for rehearing en banc, it is

ORDERED that the petition in no. 85-543 for rehearing en banc is denied.

On consideration of the joint petition of appellees and amici curiae in nos. 85-577, 86-100, 86-125, 86-185, and 86-257 for rehearing or rehearing en banc, and the responses thereto, it is

ORDERED by the merits division * that the joint petition for rehearing is denied; and it appearing that the majority of the judges of this court has voted to deny the petition for rehearing en banc, it is

FURTHER ORDERED that the petition in nos. 85-577, 86-100, 86-125, 86-185, and 86-257 for rehearing en banc is denied.

PER CURIAM

Chief Judge Rogers and Associate Judges Mack, Newman, and Schwelb would grant rehearing en banc in no. 85-543.

Associate Judges Terry and Schwelb would grant rehearing en banc in nos. 85-577, 86-100, 86-125, 86-185, and 86-257.

Copies to:

Honorable Samuel B. Block

Honorable Susan R. Winfield

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APPENDIX G

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 85-543

SAMUEL ESTEP, *et al.*,
Appellants,

v.

CONSTRUCTION GENERAL INC., *et al.*,
Appellees.

CA126-81

Before: ROGERS, *Chief Judge*; MACK, NEWMAN, FERREN, BELSON, TERRY, STEADMAN, and SCHWELB, *Associate Judges.*

ORDER

[Filed Mar. 24, 1989]

On consideration of appellants' motion to reconsider the en banc order of January 18, 1989, it is

ORDERED that the motion is denied.

PER CURIAM

Chief Judge Rogers and Associate Judge Mack would grant the motion to reconsider.

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APPENDIX H

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 85-543

SAMUEL ESTEP, *et al.*,
Appellants,

v.

CONSTRUCTION GENERAL, INC., *et al.*,
Appellees.

Appeal from the Superior Court of the
District of Columbia
(Hon. Samuel B. Block, Trial Judge)

(Argued March 5, 1986
Reargued April 20, 1987 Decided July 18, 1988)

Peter J. Vangsnes (counsel for argument on March 5, 1986), and *Wayne M. Mansulla* (counsel for argument on April 20, 1987), with whom *Wayne C. Burgy* and *Karl N. Marshall* were on the briefs, for appellants.

Ignacio B. Pessoa (counsel for argument on March 5, 1986), with whom *Christopher K. Speed* and *James M. Heffler* were on the briefs, for appellees.

Walter A. Smith, Jr. (counsel for argument on March 5, 1986 and for reargument on April 20, 1987), with whom *Vincent H. Cohen, Robert B. Cave* and *David F. Grady* were on the briefs, for amicus curiae Washington Metropolitan Area Transit Authority.

Edward E. Schwab, Assistant Corporation Counsel, with whom *John H. Suda*, Acting Corporation Counsel

at the time the briefs were filed, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the briefs, for the District of Columbia.

Before MACK, FERREN, and STEADMAN,* *Associate Judges.*

Opinion for the court by *Associate Judge* FERREN.

Dissenting opinion by *Associate Judge* MACK at [App. 57a].

FERREN, *Associate Judge*: Samuel Estep was injured in 1979 while working for Krick Commercial, Inc. He received compensation from Krick under the District of Columbia Workmen's Compensation Act of 1928, D.C. Code § 36-501 (1973), which applied to injuries occurring before mid-1982. Estep and his wife then brought a negligence action against the general contractor on the project, Construction General, Inc., which had neither obtained workers compensation insurance for Krick's employees nor paid any part of the compensation to Estep. The trial court granted Construction General's motion for summary judgment, reasoning that, under Supreme Court precedent, the 1928 Act granted Construction General immunity from any tort liability arising from Estep's injury.

This appeal, then, presents the question whether, under the Workmen's Compensation Act of 1928, a general contractor that did not itself obtain compensation for an injured worker is immune from tort liability when the subcontractor that directly employed the worker did meet its statutory obligation to provide compensation.[1] In

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* HUBERT B. PAIR, *Senior Judge*, was originally a member of this division. JOHN M. STEADMAN, *Associate Judge*, was drawn to replace him pursuant to the Internal Operating Procedures of this court.

[1] In this opinion, we use the term "general contractor" to refer to contractors generally; it therefore includes a subcontractor that hires a sub-subcontractor. Similarly, the term "subcontractor" also includes sub-subcontractors.

DiNicola v. George Hyman Construction Co., 407 A.2d 670 (D.C. 1979), we ruled that such a general contractor is not immune from tort liability. Five years later, however, the Supreme Court ruled in *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984), that an injured District of Columbia worker cannot sue a general contractor in tort unless both the subcontractor and the general contractor have defaulted on their statutory obligations to provide workers compensation for the injury. Under *DiNicola*, therefore, Construction General would not be immune from tort suits brought by Krick employees such as Samuel Estep. Under *Johnson*, however, Construction General would be immune because its subcontractor, Krick, did not default on Krick's statutory obligation to provide compensation to Estep. The Esteps contend that the rule announced in *Johnson* should not govern injuries covered by the 1928 Act; they argue that we should adhere to the rule of *DiNicola*. We disagree and, on the authority of *Johnson*, affirm the trial court's dismissal of the lawsuit.

I.

In 1927, Congress passed the Longshoremen's and Harbor Workers' Compensation Act (the Longshore Act) to provide workers compensation for maritime employees. 33 U.S.C. §§ 901 *et seq.* (1982). A year later, Cngress enacted the District of Columbia Workmen's Compensation Act of 1928 (the 1928 Act), which simply made the provisions of the Longshore Act applicable to deaths and injuries befalling workers employed in the District of Columbia. D.C. Code § 36-501 (1973). The 1928 Act has no substantive provisions of its own; it merely incorporates the provisions of the Longshore Act "including all amendments that may hereafter be made thereto." *Id.*

The Council of the District of Columbia has since repealed the 1928 Act and replaced it with the District of

Columbia Workers' Compensation Act of 1980 (the 1980 Act), which, for reasons not relevant here, did not take effect until July 24, 1982. D.C. Code §§ 36-301 *et seq.* (1981); *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134, 1141 (D.C. 1985) (as amended), *cert. denied*, 475 U.S. 1066 (1986). Subsequently, Congress amended the Longshore Act in the Longshore and Harbor Workers' Compensation Act Amendments of 1984 (the 1984 Amendments). Among these amendments were provisions designed to overrule the Supreme Court's interpretation in *Johnson* of the provisions of the Longshore Act at issue (by way of the 1928 Act) in this case. 33 U.S.C. §§ 904 & 905 (Supp. III 1985). In *O'Connell*, however, we held that the 1984 Amendments had no effect on District of Columbia law because the 1928 Act, to which they would have applied, no longer existed.

More specifically, we concluded that when the 1980 Act repealed the 1928 Act, all claims for injuries occurring before the effective date of the new act, July 24, 1982, were cognizable not under the 1928 Act itself, but under the *terms* of the 1928 Act by way of 1 U.S.C. § 109 (1982), "a savings statute enacted by Congress to deal with the legal effect to be accorded a repealed statute." *O'Connell*, 495 A.2d at 1141.[2] As a consequence,

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[2] In *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C. 1985) (as amended), *cert. denied*, 475 U.S. 1066 (1986), which this division is bound to follow, *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971), this court did not directly discuss what law the Council of the District of Columbia intended to apply to pre-1980 Act claims once the 1928 Act had been repealed and the 1980 Act had become effective. Theoretically, the Council could have intended to repeal the 1928 Act only as to claims accruing on or after July 24, 1982, leaving the 1928 Act, as such, including judicial interpretations thereof and congressional amendments thereto, in effect for all claims accruing before the effective date of repeal. This court in *O'Connell*, however, concluded that the Council instead absolutely repealed the 1928 Act effective July 24, 1982, leaving nothing in its place for earlier claims except the federal savings statute, 1 U.S.C. § 109 (1982). In reaching this conclusion, we did not make clear

for purposes of litigating such pre-1982 claims, the federal savings statute incorporated and thus froze the terms of the 1928 Act in the form they had immediately before the 1980 Act's effective date of repeal. It followed that, because the 1928 Act as such no longer existed as of July 24, 1982, there no longer was a District of Columbia statute to which congressional amendment of the Longshore Act could apply. *Id.* at 1140-42; *accord, Keener v. Washington Metropolitan Area Transit Authority*, 255 U.S. App. D.C. 148, 800 F.2d 1173 (1986) (deferring to this court's decision in *O'Connell*), *cert. denied*, 107 S. Ct. 1375 (1987). Whatever power Congress may have had to resurrect the 1928 Act solely for purposes of applying the 1984 Amendments to the District of Columbia, *O'Connell* must be understood to say that Congress did not do so.

In sum, Estep's claim is governed not by the 1928 Act but by the terms of the 1928 Act preserved through the federal savings statute. Accordingly, Estep's claim is governed by the provisions of the Longshore Act as they existed before the 1984 Amendments, since repeal of the 1928 Act itself eliminated the statutory basis for incorporating later amendments to the Longshore Act into District of Columbia law.

II.

Section 4 (a) of the Longshore Act requires employers to obtain compensation for injured employees. 33 U.S.C.

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whether this result was the Council's intent or instead was dictated by Congress, irrespective of the Council's intent, as the law that applies whenever a congressionally-enacted statute of purely local application in the District of Columbia is repealed. In any event, *O'Connell*, in applying to pre-1980 Act claims the terms of the 1928 Act through the federal savings statute, rather than applying the 1928 Act as such, resolved an ambiguity in two earlier opinions that simply said the 1928 Act applied to claims accruing before the effective date of the new act. *See Garrett v. Washington Air Compressor Co.*, 466 A.2d 462, 462 n.1 (D.C. 1983); *Carey v. Crane Service Co., Inc.*, 457 A.2d 1102, 1103 n.2 (D.C. 1983).

§ 904 (a) (1982). In exchange for undertaking this obligation, employers receive immunity under § 5 (a) from tort suits by injured employees. 33 U.S.C. § 905 (a) (1982). "In return for the guarantee of compensation, the employees surrender common-law remedies against their employers for work-related injuries. For the employer, the reward for securing compensation is immunity from employee tort suits." *Johnson*, 467 U.S. at 931. It follows that an employer who defaults on the obligation to provide compensation does not receive such immunity. 33 U.S.C. § 905 (a) (1982).

The situation of general contractors, however, presents a special problem. Section 4 (a) specifically requires a general contractor to obtain compensation for employees of its subcontractor only if the subcontractor has failed to do so. Thus, a general contractor that fails to obtain compensation does not default on its statutory obligations unless the subcontractor also has failed to obtain compensation. 33 U.S.C. § 904 (a) (1982). The 1928 Act did not make clear, however, whether such a non-defaulting general contractor enjoys the same immunity from tort suits that a non-defaulting employer generally enjoys, even though the general contractor has not itself obtained compensation or insurance for its subcontractor's employees.

In *DiNicola*, we held that under the 1928 Act a general contractor can be sued for its negligence when the subcontractor has paid the injured employee as the workers compensation scheme demands. According to *DiNicola*, the general contractor enjoys tort immunity only when the subcontractor has failed to obtain adequate insurance and the general contractor then meets its resulting duty to step in to pay workers compensation. In reaching this result, the *DiNicola* court interpreted the relevant provisions of the federal Longshore Act; as have other decisions of this court, the *DiNicola* opinion consistently

characterized its reasoning as a construction of federal law and drew upon federal court precedents interpreting the Longshore Act. *See DiNicola*, 407 A.2d at 672, 674-75; *see also Lee v. District of Columbia Department of Employment Services*, 509 A.2d 100, 103 (D.C. 1986); *Milligan v. Brian Construction Development Co.*, 485 A.2d 593 (D.C. 1984); *Dodson v. Washington Automotive Co.*, 461 A.2d 1020 (D.C. 1983) (per curiam).

Several years later, the Supreme Court squarely rejected *DiNicola*'s understanding of §§ 4 (a) and 5 (a) of the Longshore Act, as incorporated in the 1928 Act. In *Johnson*, the Court held that general contractors share the presumption of immunity enjoyed by all employers. Like other employers, a general contractor loses this immunity only if it defaults on its statutory obligations. *Johnson*, 467 U.S. at 937. But, because a general contractor has no obligation to its subcontractor's employees unless the subcontractor has defaulted, the general contractor cannot default under the statute as long as the subcontractor provides compensation. The general contractor, therefore, loses its immunity only when both the subcontractor and the general contractor have failed to pay workers compensation. It is only the general contractor's failure to step in after the subcontractor has defaulted that removes the general contractor's tort immunity. *Id.* at 938-40.

The *Johnson* case arose from injuries suffered by employees of subcontractors working for the Washington Metropolitan Area Transit Authority (WMATA) as general contractor. The employees were covered by the 1928 Act, not directly by the federal Longshore Act. Their suits against WMATA, therefore, were brought under the 1928 Act, and any resolution of their complaints necessarily constituted a construction of the 1928 Act. *Johnson* accordingly interpreted §§ 4 (a) and 5 (a) of the Longshore Act as incorporated into the 1928 Act, the

same District of Columbia law at issue in *DiNicola* and in the present case. *See Johnson*, 467 U.S. at 927-28 & n.4.

Like this court in *DiNicola*, the Supreme Court in *Johnson* reached its view of the 1928 Act through an interpretation of the Longshore Act. Both the Supreme Court in *Johnson* and this court in *DiNicola*, therefore, drew no distinction between the 1928 Act and the Longshore Act; both courts assumed that a correct interpretation of §§ 4 (a) and 5 (a) of the Longshore Act constituted a correct interpretation of the 1928 Act. But that is where the similarity ends. *Johnson* and *DiNicola* adjudicated the same issue with respect to the same statute and reached absolutely conflicting results. The question, then, is which decision binds us now.

III.

The 1928 Act was enacted by Congress but affects only the District of Columbia. "Acts of Congress affecting only the District, like other federal laws," fall within the Supreme Court's Article III jurisdiction. *Whalen v. United States*, 445 U.S. 684, 687 (1980). The Supreme Court has the power to review "decisions of the District of Columbia Court of Appeals interpreting those Acts" and may reject decisions of this court interpreting local laws passed by Congress. *Id.* Accordingly, in *Johnson* the Supreme Court acted entirely within its authority in deciding for itself the question of contractor liability under the 1928 Act, despite the existence of a local Court of Appeals decision reaching the contrary result. The Esteps argue that we may, nonetheless, decline to enforce the Supreme Court's construction because *Johnson* failed to give the deference to the District of Columbia Court of Appeals that the Court's own precedents demand.

A.

Although the Supreme Court has the power to exercise plenary review over questions raised by Acts of Congress

touching only the District of Columbia, it has chosen to treat decisions of this court on questions of local law "in a manner similar to the way in which [it] treat[s] decisions of the highest court of a State on questions of state law." *Pernell v. Southall Realty*, 416 U.S. 363, 368 (1974) (footnote omitted). The Supreme Court has stated that it will not overrule the District of Columbia courts on matters of local law " 'save in exceptional situations where egregious error has been committed.' " *Id.* at 369 (quoting *Fisher v. United States*, 328 U.S. 463, 476 (1946)).

The Esteps point out, however, that the *Johnson* opinion betrays no such deference to our decision in *DiNicola*.[3] Nor does *Johnson* even mention the doctrine of deference to the local District of Columbia courts. Had it treated the 1928 Act as a local law, contend the Esteps, the Supreme Court presumably would have deferred to our decision in *DiNicola*, not overruled it. (Perhaps even more likely, they say, the Court might not have addressed the issue at all in a case arising under the local law of the District rather than under the Longshore Act itself.) In any event, the Esteps argue we may ignore *Johnson* because the Supreme Court erred, according to its own doctrine, by failing to defer. They would have us treat *Johnson* as a state court may treat the

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[3] Indeed, *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984), cites *DiNicola* only as one of the majority of cases that have "concluded that § 5(a)'s tort immunity can extend to general contractors, at least when the contractor has fulfilled its responsibilities to secure compensation for subcontractor employees in accordance with the requirements of § 4(a)." 467 U.S. at 933-34 (citing *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670, 674 (D.C. 1979)); *cf. DiNicola*, 407 A.2d at 674 (approving prior cases "concluding that a land-based general contractor is liable as a third party for his negligence"). *Johnson*, therefore, does not even mention that this court had interpreted the local law directly at issue and had held general contractors not immune unless they did in fact obtain compensation for the injured employees of their subcontractors.

rare examples of Supreme Court interpretation of state law that rest on neither a federal statute nor on the federal constitution: just as a state court may ignore a Supreme Court construction purely of state law, this court may ignore the *Johnson* Court's non-deferential construction of local law. *See Owen J. Jones & Son, Inc. v. Gospodinovic*, 46 Or. App. 101, ——, 610 P.2d 1238, 1241 (1980) (en banc) ("A construction of an Oregon statute by the United States Supreme Court is instructive, but not necessarily controlling."); *American Radiator & Standard Sanitary Corp. v. Mark Engineering Co.*, 230 Md. 584, ——, 187 A.2d 864, 866 (1963) (same).

The view that Supreme Court rulings on state law cannot bind the state's own courts is justified because "Supreme Court decision of state law questions for the future"—rather than solely for a specific case at hand—"would be such startingly bad federalism that it could easily be called unconstitutional." 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4021 at 680 (1977) (footnote omitted). Because the District, however, is not a state, Supreme Court interference with the courts of the District cannot raise legitimate objections grounded purely on concerns about federalism. Moreover, although Congress has directed that District of Columbia courts have great autonomy in the application of local laws—and the Supreme Court itself has embraced this principle—the Court has held only that it will treat decisions of this court "in a manner similar" to its treatment of state court decisions on state law. *Pernell*, 416 U.S. at 368. The principle that a state may ignore Supreme Court rulings on state law, therefore, has no direct application to the relation between the Supreme Court and the District of Columbia courts. Whether there are circumstances in which we may nonetheless decline to follow a Supreme Court decision construing a local law adopted by the Congress, however, is a question we need not decide. Nor, of course, is a matter of local law adopted by

the Council of the District of Columbia before us. *See Meiggs v. Associated Builders*, Nos. 85-577 *et al.*, (D.C. July 18, 1988). Whatever merit the Esteps' argument might have in another context, we conclude it does not apply here, for, as elaborated below, in construing the 1928 Act of Congress, the Supreme Court implicitly concluded that deference to this court was "inappropriate with respect to the statute[] involved." *Whalen*, 445 U.S. at 688.

B.

The Supreme Court has stated that the doctrine of deference to the District of Columbia courts on matters of local law does not apply when a question of general federal law "cannot be separated" from the question of local law. *Whalen*, 445 U.S. at 688.[4] We believe *Johnson*

[4] The opinion for the Court in *Whalen v. United States*, 445 U.S. 684 (1980), does not make entirely clear the relevant sense in which the construction of the local law in that case was inseparable from the federal law. The *Whalen* Court set out to determine whether, in enacting the local District of Columbia criminal law, Congress intended to allow the local courts to impose separate, consecutive sentences for rape and killing during the commission of a rape. This was a question of construing purely local law, seemingly an issue for which deference to this court was due. The Supreme Court, however, found a nexus between local and federal law in the fact that, if Congress had not intended to allow consecutive sentences, then the local courts had violated the double jeopardy clause of the fifth amendment by giving Whalen consecutive sentences for rape and first degree murder. The Court believed this nexus was sufficient to remove the case from those in which deference is due, though not absolute. But the question whether Congress intended to allow multiple sentences was logically independent of the fifth amendment bar on courts imposing multiple sentences unless authorized by Congress; thus, *Whalen* was not a case where local and federal questions were bound together because resolution of the local question depended upon resolution of the federal question. It is difficult to understand why deference was not due on the independent issue of statutory construction. The concurring opinions of Justices White and Blackmun may provide a more solid ground for the Court's decision to reverse this court's view of congressional intent in *Whalen*. In their view, the local court was owed initial deference but had made the kind of "egregious error" that

embodies the premise that, because the 1928 Act merely incorporates the provisions of the Longshore Act, construction of the 1928 Act "cannot be separated" from construction of the Longshore Act, and thus Congress intended the construction of the local law and the federal law to be identical.

The *Johnson* Court was aware that the controversy in that case had arisen within the District of Columbia and that the employees had received workers compensation under the 1928 Act rather than directly under the Longshore Act. *See Johnson*, 467 U.S. at 927-28 & n.4. The Court nonetheless refers throughout only to the provisions of the Longshore Act and characterizes its holding as an interpretation of the Longshore Act controlling all future applications of the federal law. The form of the decision, then, is consistent with the premise that the meaning of relevant provisions of the 1928 Act is identical to the meaning of the same terms viewed solely as provisions of the Longshore Act. Because the 1928 Act falls within the Supreme Court's Article III jurisdiction, it is entirely within the Supreme Court's power to interpret the local law as a pure incorporation of the federal law and, therefore, as identical in meaning to the federal Act. In applying this view of the local law (as identical to the federal statute) the Supreme Court did not act contrary to any decision of this court. As noted above, our decisions in *DiNicola* and other cases at least implicitly have taken precisely the same approach. Indeed, in *Dodson*, we expressly said that the Supreme Court's interpretation of the 1928 Act provisions at issue in that case was binding on this court. *See Dodson*, 461 A.2d at 1024 (following *Rodriguez v. Compass Shipping Co.*,

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justified the Supreme Court in overriding this court's interpretation of the Act of Congress in question. *See Whalen*, 445 U.S. at 695-96 (White, J., concurring), 696 (Blackmun, J., concurring).

Ltd., 451 U.S. 596 (1981), in construing D.C. Code § 36-501 (1973)).[5]

We believe the *Johnson* and *DiNicola* courts' understanding of the relation between the 1928 Act and the Longshore Act is fully justified, at least with respect to provisions, such as those governing general contractor liability, that apply equally to the contexts of land-based and maritime employment. The two laws were passed by the same Congress. More strikingly, the text of the 1928 Act does not track or imitate the terms of the Longshore Act but expressly states the Longshore Act, as such, shall apply as the District of Columbia's workers compensa-

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[5] The treatment here accorded the 1928 Act is entirely consistent with the view that it is a "local law" and that the United States Courts of Appeal for the lower federal courts continue to owe deference to this court in interpreting that law. The United States Court of Appeals for the District of Columbia Circuit has developed a practice of treating local interpretations of local law exactly as, under the doctrine of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), federal courts in the states treat state court interpretations of state law. *Hall v. C & P Telephone Co.*, 253 U.S. App. D.C. 368, 370-71, 793 F.2d 1354, 1356-57 (1986), *reh'g denied*, 258 U.S. App. D.C. 83, 809 F.2d 924 (1987). The Circuit Court has applied this doctrine to construction of the 1928 Act. *Id.* at 1355-59; *Keener v. Washington Metropolitan Area Transit Authority*, 255 U.S. App. D.C. 148, 152-53, 800 F.2d 1173, 1177-78 (1986), *cert. denied*, 107 S. Ct. 1375 (1987). (The Circuit Court in *Johnson*, contrary to current practice, did not expressly defer to *DiNicola*. *See Johnson v. Bechtel Associates Professional Corp.*, 230 U.S. App. D.C. 297, 303-06, 717 F.2d 574, 580-83 (1983), *rev'd on other grounds, Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984).) This deference by the Circuit Court is called for even where the Supreme Court has decided deference on its own part is not appropriate. Just as the Supreme Court is the third and last forum after the Superior Court and this court, the Supreme Court is the final forum after the federal District Court and Circuit Court of Appeals, comprising a system distinct from but parallel to the local court system. The Supreme Court, therefore, may properly construe local law in contradiction to a holding of this court, whereas the federal District and Circuit Courts ought not to do so out of respect for this court's primary role in construing District of Columbia law.

tion law. The full text of the 1928 Act (aside from a provision stating exceptions not relevant here) consists of a single sentence stating that "[t]he provisions of [the Longshore Act], including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia"—with appropriate broadening of the terms "employer" and "employee" to extend beyond maritime occupations. D.C. Code § 36-501 (1973). Congress suggested no intention to differentiate between the substantive compensation schemes of the local and federal laws; it provided instead that all amendments to the federal law would become part of the local law. The manner in which Congress wrote the 1928 Act, therefore, indicates its intention that the two laws be substantively the same. From this we infer that an authoritative judicial interpretation of the Longshore Act should generally control the meaning of the 1928 Act.

The *Johnson* and *DiNicola* courts, therefore, correctly assumed that to construe the 1928 Act is to construe the Longshore Act, and vice versa. This conclusion does not preclude the possibility that, in some circumstances, the two Acts may diverge. A court construing the 1928 Act may find good reason to give the local law a gloss different from an interpretation appropriate to the federal law, for the two Acts cover different kinds of employment that may justify different treatment of specific problems. *Cf. Gudmundson v. Cardillo*, 75 U.S. App. D.C. 230, 126 F.2d 521 (1942) (declining to apply *Crowell v. Benson*, 285 U.S. 22 (1932), which construed the Longshore Act, to a 1928 Act case because *Crowell* concerned constitutional limits on the admiralty power of Congress not relevant to congressional power over the District of Columbia); *Director, Office of Workers' Compensation Programs, United States Department of Labor v. National Van Lines, Inc.*, 198 U.S. App. D.C. 239, 243 n.20, 613

F.2d 972, 978 n.20 (1979) (United States Court of Appeals for the District of Columbia Circuit has broader territorial jurisdiction over 1928 Act claims than over Longshore Act claims), *cert. denied*, 448 U.S. 907 (1980); *see also Hall v. C & P Telephone Co.*, 253 U.S. App. D.C. 368, 372-73, 793 F.2d 1354, 1358-59 (1986). Here, however, we see no reason to believe the nature of claims arising under the 1928 Act rationally demands a different treatment of general contractor liability from the treatment accorded under the Longshore Act. Accordingly, *Johnson*, not *DiNicola*, controls.[6]

Affirmed.

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[6] Basically, the dissent says that *DiNicola*, not *Johnson*, should control because the Supreme Court "simply failed to recognize that *Johnson* involved 'an issue of local law' . . . . [T]he Supreme Court in *Johnson* did not interpret the local act." *Post* at 25, 31. We are unwilling to end-run the Supreme Court on that basis; *Johnson* squarely presented, and necessarily decided, the 1928 Act issue.

MACK, *Associate Judge*, dissenting: In 1970, Congress undertook a radical reorganization of the court system of the District of Columbia. It created an autonomous local judicial system and announced that from then on "[t]he highest court of the District of Columbia is the District of Columbia Court of Appeals." [1] In the years that have followed, this court, by virtue of the Court Reorganization Act, as reinforced by the Home Rule Act,[2] has been thrust in the role of the final expositor of District of Columbia law. *See Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979); *Reichman v. Franklin Simon Corp.*, 392 A.2d 9 (D.C. 1978).[3]

Today the majority of the "highest court of the District of Columbia" reaches a remarkable conclusion. It decides that this court is prohibited from following its own prior interpretation of the District of Columbia Workmen's Compensation Act of 1928 (hereinafter "DCWA" or "1928 Act").[4] *See DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979). This is because, reasons the majority, the Supreme Court, some five years after *DiNicola*, reached a "conflicting" result in interpreting the Longshore and Harbor Workers' Compensation Act of 1927 (hereinafter "LHWCA" or "1927

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[1] District of Columbia Court Reorganization Act of 1970, D.C. Code § 11-102 (1981); *see generally* Pub. L. No. 91-358, 84 Stat. 473 ("Court Reorganization Act") (codified at scattered sections of the D.C. Code and U.S.C.).

[2] District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. No. 93-198, 87 Stat. 774 (codified at scattered sections of the D.C. Code).

[3] *See also* D.C. Code § 11-723 (1987 Supp.) (D.C. Court of Appeals may answer questions certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or the highest appellate court of any state).

[4] 45 Stat. 600, ch. 12 (codified as amended at D.C. Code §§ 36-501 to -502 (1973)).

Act")[5] in ruling upon facts arising in the District of Columbia. *See Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984).

The majority recognizes that the Supreme Court of the United States "has chosen" to treat decisions of the District of Columbia Court of Appeals on questions of local law "in a manner similar to the way in which [it] treat[s] decisions of the highest court of a State on questions of state law." Majority opinion at 9 (citing *Pernell v. Southall Realty*, 416 U.S. 363, 368 (1974) (footnote omitted)). Uneasy, no doubt, with the appellants' argument that the Supreme Court in *Johnson* erred in not following its principle of deference, the majority volunteers its own rationale: *Johnson*, says the majority, "squarely rejected" *DiNicola* because deference to *DiNicola* would have been "inappropriate"—on the surface an interesting conclusion since *Johnson* says nothing about rejecting *DiNicola*, failing to defer to, or overruling District of Columbia law.[6]

To the majority's credit, its reasoning does not hinge solely upon a knee-jerk reaction to the history of the District of Columbia's hybrid existence. It instead focuses upon isolated language in the case of *Whalen v. United States*, 445 U.S. 684 (1980), to the effect that "[a]cts of Congress affecting only the District, *like other federal laws*, certainly come within [the Supreme] Court's Art. III jurisdiction," *id.* at 687 (emphasis added) and reasons therefrom that the Supreme Court may reject decisions of this court interpreting local laws passed by Congress. To the extent that the "power" of the Supreme Court to review (as opposed to the "appropriateness" of deference) may be relevant to meet the majority's analysis, I need not question the proposition that the Supreme Court is not constitutionally barred

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[5] 33 U.S.C. §§ 901 to 950 (1982).

[6] The trial court ruled that *Johnson* had "effectively" overruled *DiNicola*.

from reviewing the decisions of the District of Columbia Court of Appeals interpreting acts passed by Congress, in the same sense that the Supreme Court would be barred from reviewing a state court's interpretation of a state statute. *Id.* at 687-88. I feel compelled, nevertheless, not to shirk from suggesting, however delicately, that it is not at all clear that acts of Congress affecting only the District are "laws of the United States" within the meaning of Article III.[7] Congress, in legislating for the District, acts pursuant to its constitutional powers under Art. I, § 8, cl. 17, which grants the Congress the power of "exclusive legislation in all cases" in the District.[8] Congress' federal powers and its powers under

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[7] Article III provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . ." U.S. Const. art. III, § 1. "The Judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the *Law of the United States* . . . ." *Id.* 2 (emphasis added). In this class of cases, "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." *Id.*

As I suggest, it is not clear that congressional acts affecting only the District are "laws of the United States." But even if they are, it may be that the Court Reorganization Act's designation of this court as the "highest court of the District of Columbia," together with Congress' mandate that the District of Columbia Court of Appeal's decisions be treated like those of the highest court of a state, constitute a congressional "exception" or "regulation" under Art. III, § 2.

[8] In legislating for the District of Columbia, Congress acts pursuant to its powers under Art. I, § 8, cl. 17 which grants the Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . . ." Clause 17 actually grants three types of power to the Congress: first, the power to extend laws of nationwide application to the District; second, the power to protect national interests there; and third, the power to enact state-like local laws governing District residents. There should be little dispute that laws passed pursuant to the first two types of power

clause 17 are "two distinct classes of legislative powers . . . . [Laws passed pursuant to the clause 17 powers] are not laws of the United States." *American Security & Trust Co. v. Rudolph*, 38 App. D.C. 32, 45 (1912).[9] *See O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134, 1140 n.11 (D.C. 1985), *cert. denied*, 475 U.S. 1066 (1986); *see also Gary v. United States*, 499 A.2d 815, 850 (D.C. 1985) (en banc) (Mack, J., dissenting) (when Congress acts as a national legislature, it is but one actor among three, but when it acts on a local scale, it " 'encompasses the *full* authority of government . . . the Executive and Judicial powers as well as the Legislative' " (emphasis in original)), *cert. denied*, 477 U.S. 906 (1986).

I am entitled to be bold in this respect because the Supreme Court, understandably in decisions over the years,[10] has not been entirely consistent in its jurisdic-

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are laws of the United States. However, it is not immediately apparent that congressionally passed laws affecting only the District of Columbia "are like other federal laws." This assumes that every law passed by Congress is a law of the United States. For District of Columbia purposes, we cannot equate "federal" and "United States."

[9] The Court of Appeals of the District of Columbia went on to explain that

> Congress is the sole legislative body for the Union, and in a broad sense all of its enactments are laws of the United States. But it has two distinct classes of legislative powers. The general function which it was established to perform is the enactment of laws that operate and govern throughout the United States. By virtue of the cession of the District of Columbia, it became invested with special legislative powers . . . to the full extent possesed by [the ceding states].

American Security, supra, 38 App. D.C. at 45. Laws passed pursuant to these powers are not "laws of the United States . . . ." *Id.*

[10] In *Key v. Doyle*, 434 U.S. 59 (1977), for example, the Supreme Court held that a congressional enactment of purely local application is not "a 'statute of the United States' for [§ 1257(1) jurisdic-

tional treatment of congressional acts affecting only the District. And now, in view of the action of the Congress in transferring matters of purely local concern from the United States courts to the District of Columbia courts, I am reasonably sure that the Supreme Court has no burning desire to be thrown into the role of "the highest court of the District of Columbia." This question, however, can be left for another day, since it is apparent that the majority here, in finding that we are compelled to follow *Johnson*, has construed *Johnson* too rigidly, and has totally misconstrued *Whalen*.

I.

The majority here reads *Whalen* to stand for the proposition that the Supreme Court need not defer to the District of Columbia courts on matters of local law "when a question of *general federal law* 'cannot be separated' from a question of *local law*." Majority opinion at 12 (citing *Whalen, supra*, 445 U.S. at 688 (emphasis added)). On this basis, the majority concludes that since the local act merely incorporates the provisions of the federal act, construction of the 1928 Act cannot be separated from the LHWCA [11] and therefore, the Su-

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tion] purposes . . . ." *Id.* at 61. In contrast, in *Palmore v. United States*, 411 U.S. 389 (1973), the Court held that where a prisoner sought appeal of his conviction under the D.C. Code as a matter of right (rather than by petition for certiorari), the District of Columbia Code should not be considered a state statute.

[11] Notwithstanding the fact that the DCWCA merely incorporated the federal act, the DCWCA and the LHWCA remain jurisprudentially distinct. The LHWCA was passed pursuant to Congress' admiralty power; the DCWCA, on the other hand, was passed pursuant to its plenary power to govern the District of Columbia. U.S. Const. art. I, § 8, cl. 17; *O'Connell, supra*, 495 A.2d at 1140 n.11. Congress' use of identical language does not alter the local nature of the act. The 1928 Act is a form of "hybrid statute," one which although local in nature borrows the language of a federal statute subject to appropriate modifications. Where hybrid state statutes are involved, interpretation of the underlying federal language does pre-

preme Court in *Johnson* owed no deference to this court's decision in *DiNicola*. In my view, this is an overly expansive reading of *Whalen*—one which completely ignores the constitutional underpinnings of that decision.

In *Whalen*, the petitioner was convicted of rape, and of killing the same victim in the perpetration of rape, and sentenced to separate terms of imprisonment for each conviction. He argued that the sentence for the offense of rape should be vacated since it merged for purposes of punishment with the felony-murder offense. To hold to the contrary, Whalen argued, would be to interpret the District of Columbia statutes so as to impose multiple punishments for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment.[12]

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sent a federal question which the Supreme Court may answer. However, the highest court of the incorporating state is still free to interpret the state statute in a manner inconsistent with the Supreme Court's interpretation of the underlying federal language. *Standard Oil v. Johnson*, 316 U.S. 481 (1942). *See* C. WRIGHT, THE LAW OF FEDERAL COURTS § 107, at 748 (1983) ("where a state statute incorporates federal law by reference, the Supreme Court may review a state court decision as to that statute, pass on the federal question that is incorporated by reference, and remand for the state court to reconsider its interpretation of the statute in light of the Supreme Court's interpretation of the underlying federal law").

Where a hybrid D.C. statute is involved, may the District of Columbia Court of Appeals follow the doctrine of *Standard Oil?* While the majority concludes that this is a question that it need not answer, it notes that principles of federalism do not compel the *Standard Oil* result with respect to the District. This is true. However, Congress has designated this court the "highest court of the District of Columbia." *Standard Oil* thus might be applicable to the District not because of principles of federalism but because of a Congressional decision.

[12] In footnote 4, the majority attempts to disengage the local law question (*i.e.*, the question of statutory construction) in *Whalen* from the constitutional question: "But the question whether Congress intended to allow multiple sentences was logically independent

The Supreme Court, as the majority here correctly points out, noted in *Whalen* that deference is due to the District of Columbia courts "on matters of purely local concern." *Whalen, supra*, 445 U.S. at 687 (citing *Pernell v. Southall Realty, supra*, 416 U.S. at 366). But the majority fails to recognize that the Supreme Court, in declining to extend deference in *Whalen*, found that "petitioner's claim under *the Double Jeopardy Clause* [could not] be separated entirely from a resolution of the question of statutory construction." *Whalen, supra*, 445 U.S. at 688 (emphasis added). Thus, in *Whalen*, the Supreme Court refused to defer to this court's interpretation of local law because *the interpretation of the local law was intertwined with a constitutional question*; the Court did not suggest that deference is inappropriate where a question of local law cannot be separated from a question of general federal law.[13] *Whalen* therefore cannot be used as a vehicle to compel the conclusion that the Supreme

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of the fifth amendment bar of courts imposing multiple sentences unless authorized by Congress." Majority opinion at 12 n.4. Notwithstanding the merits of this argument, the Supreme Court's decision not to defer was based upon a belief that the constitutional question and the local law question were intertwined: "But the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." *Whalen, supra*, 445 U.S. at 688. At any rate, the Court repeatedly iterated that the local law question was tied up with a constitutional question. Nowhere did the Court suggest that it was declining to defer because the local law question was tied up with a general question of federal law.

[13] I would also note that the *Whalen* standard is not the only one adopted by the Supreme Court with respect to review of District of Columbia Court of Appeals' interpretations of local law. In *Pernell v. Southall Realty, supra*, the Court noted that the Court Reform Act supported its "longstanding practice of not overruling the Courts of the District on local law matters 'save in exceptional situations where egregious error has been committed.'" *Id.* at 369 (citations omitted). The *Johnson* court points to no "egregious error" committed by this court in *DiNicola*.

Court in *Johnson* intended to overrule this court's interpretation of a local law.

II.

Moreover, *Johnson* cannot be read as overruling this court's interpretation of a local law. The language of *Johnson* simply does not say this; in fact, unless it can be said that a printing or typographical error has intervened, *Johnson* cites *DiNicola* as representing the majority view which it is predisposed to follow. More significantly, the question of deference to local law was not briefed or argued. In fact, there is no indication that the *Johnson* Court focused upon the fact that a question of local law was involved. The length to which the majority here strains is apparent in its reasoning—*i.e.* since the Supreme Court was aware that the controversy in *Johnson* had arisen in the District of Columbia and since the Court referred only to the provisions of the Longshore Act, the "*form* of the decision, then, *is consistent with the premise* that the meaning of relevant provisions of the 1928 Act is identical to the meaning of the same terms viewed solely as provisions of the [LHWCA]." Majority opinion at 13 (emphasis added).[14]

It is equally true, however, that the form of the decision is consistent with the premise that the Court simply failed to recognize that *Johnson* involved "an issue of local law." As the majority here correctly explains, *Johnson* arose as a result of injuries suffered by employees of subcontractors working for the Washington Metropolitan

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[14] It might surprise the Supreme Court to know that, in *Johnson*, it "implicitly concluded that deference to this court was inappropriate" Majority opinion at 12. In this regard, I am reminded of an apt observation by the Supreme Court:

> Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.

Webster v. Fall, 266 U.S. 507, 511 (1925) (citations omitted).

Area Transit Authority (WMATA) as general contractor. Metro was a massive construction project which led the general contractor, WMATA, to engage several hundred subcontractors, which in turn engaged over a thousand sub-subcontractors. Although not legally required to do so by the 1928 Act, WMATA purchased a "wrap-up" insurance policy covering the employees of all of its subcontractors. WMATA passed on to the subcontractors the cost of the insurance so that although the subcontractors were technically relieved of their normal statutorily-required insurance payments, they did in effect provide such payments. *See Johnson, supra*, 467 U.S. at 927-30.

The issue in *Johnson* was whether WMATA as general contractor was immune from suit. The Supreme Court, based upon the language of the employer's tort immunity clause in the federal LHWCA held that WMATA was protected from a negligence action by the employee of one of its subcontractors. "[Sections] 4(a) and 5(a) of the LHWCA render a general contractor immune from tort liability provided the contractor has not failed to honor its statutory duty to secure compensation for subcontractor employees when the subcontractor itself has not secured such compensation. So long as general contractors have not defaulted on this statutory obligation to secure back-up compensation for subcontractor employees, they qualify for § 5(a)'s grant of immunity." *Johnson, supra*, 467 U.S. at 939-40.

The *Johnson* Court did not recite that the controlling law in the case was the 1928 D.C. Act; the DCWCA was mentioned only once in a cursory footnote,[15] but then the Court proceeded, without further comment, to interpret the language drawn from the underlying LHWCA. At

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[15] The Supreme Court in footnote 4, refers to the District of Columbia statute: "District of Columbia Code § 36-501 (1973) incorporates the LHWCA, 33 U.S.C. § 901 *et seq.*, to cover employees 'carrying on any employment in the District of Columbia.'" *Johnson, supra*, 467 U.S. at 928 n.4.

no point did the *Johnson* Court address the possible jurisprudential implications of the DCWCA's status as a local statute.

The *Johnson* Court also gave no indication that it was in fact interpreting the DCWCA by interpreting the identical provisions of the LHWCA. The Court did not discuss the relationship between the 1928 Act and the LHWCA and nowhere did the Court state that "the meaning of relevant provisions of the 1928 Act is [to be] identical to the meanings of the same terms viewed solely as provisions of the [LHWCA]." Majority opinion at 13. In short, the Court in *Johnson* simply did not interpret the 1928 Act.

Perhaps one explanation for the Court's analysis in *Johnson* was the unique overlap of federal and local functions, both administrative and judicial, which until recently existed in the District. For ease of administration, claims for workers' compensation under the DCWCA had been processed by the federal Department of Labor along with those arising under the LHWCA. *See* D.C. Code § 36-503 (1973). Consequently, although it was the application of the DCWCA that was actually at issue in *Johnson*, the petition for review of the compensation order was brought to the United States Court of Appeals for the District of Columbia Circuit, rather than to this court. Given this history, the purely local nature of the governing statute was perhaps somewhat obscured. As a result, the *Johnson* Court did not afford its normal deference to this court because it did not realize that deference was appropriate. The Court viewed the controlling law as the LHWCA not the DCWCA and thus there was no issue of "purely local concern."

III.

Even a strict interpretation of a statutory provision ofttimes cannot be divorced from the spectre of accompanying facts. I believe that this is what inadvertently

happened in *Johnson*; I do not believe that the Supreme Court has interpreted the statutory provisions at issue in the instant case and I do not believe we are constrained by conflicting Supreme Court precedent as a result of *Johnson*.

As to the persuasiveness of the *Johnson* decision in hindsight, I note that the Court initially conceded the existence of an "ambiguity" in the wording of the LHWCA which rendered the scope of immunity for general contractors "unclear." It acknowledged that the immunity language "does not effortlessly embrace" general contractors and that a "slightly strained reading" is required to include them as employers at all. *Johnson*, *supra*, 467 U.S. at 933-34. Indeed, the Court very reluctantly departed from its own admonition that in construing the LHWCA " 'the wisest course is to adhere closely to what Congress has written.' " *Id.* at 934 (citation omitted). Not only was this an admonition, it was a premonition since *Johnson*'s departure from "the wisest course" was quickly repudiated by Congress:

> The Supreme Court in *Washington Metropolitan Area Transit Authority v. Johnson*, [*supra*], changed key components of what had widely been regarded as the proper rules governing contractor and subcontractor liability and immunity under the Longshoremen's and Harbor Workers' Compensation Act.
>
> * * *
>
> *WMATA* [*v. Johnson*], the conferees believe, does not comport with the legislative intent of the Act nor its interpretation from 1927 through 1983. The case should not have any precedential effect.[16]

Thus, the Congress confirmed that the reasoning and outcome in *Johnson* did not comport with the philosophy

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[16] H.R. CONF. REP. No. 1027, 98th Cong., 2nd Sess. 24 (1984), *reprinted* in U.S. CODE CONG. & ADMIN. NEWS 2771, 2774.

underlying workers' compensation schemes. I might add that general contractor immunity destroys the *quid pro quo* of workers' compensation. *See Meiggs v. Associated Builders*, No. 85-577, slip op. at 13 (July 18, 1988). Nor does general contractor immunity find support in the argument that it is appropriate since the general contractor bears the cost of the subcontractor employer's insurance policy in the form of an increased subcontract price. Basic principles of economics teach that the general contractor does not bear this increased cost; the general contractor simply passes the cost on to whomever is on the other side of the contract. *DiNicola, supra*, 402 A.2d at 674. To apply "ultimate cost" reasoning to support general contractor liability threatens total abolition of an insured workers' statutorily protected right to sue negligent third parties.

The reasoning of *Johnson* would also eliminate the incentive for the general contractor, or intermediate contractors between the general contractor and the actual employer, to avoid hazardous conditions in the workplace. As this court recognized in *DiNicola*, the object of workers' compensation is not served once insurance has been provided, regardless of who purchased it or whether they were under an obligation to do so. Workers' compensation benefits are limited by statute; they are not designed to compensate for all of the damages suffered by the injured employee.

IV.

Finally, it seems to me that the outcome so tortuously reached by the majority here is patently unfair. Under the federal LHWCA, injured employees are not barred from suing general contractors; Congress amended the LHWCA to overturn *Johnson* almost immediately. Likewise, under the District of Columbia Workers' Compensation Act of 1979,[17] which superseded the 1928 Act,

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[17] 27 D.C. Reg. 2503, 2507-08 (1980) (as codified at D.C. Code § 36-301 (1981)).

general contractors do not have immunity. *See Meiggs v. Associated Builders, supra,* slip op. at 3. Moreover, if the District of Columbia Council had not passed the 1979 legislation, this issue would not now be before this court. General contractors would not be immune from suit under the federal Act or the local 1928 Act. Congressional amendments to the LHWCA overturning *Johnson* would have applied to the 1928 Act as well. But the District of Columbia Council did pass the 1979 Act repealing the 1928 Act, and so when Congress repudiated *Johnson,* there was no 1928 Act to be amended. *See O'Connell v. Maryland Steel Erectors, Inc., supra.* The majority here accepts the proposition of *O'Connell* that the Congress in 1984 could not have amended an act which no longer existed. Yet it turns to a general savings statute (1 U.S.C. § 109 (1982); July 30, 1947, ch. 388, 61 Stat. 635) to hold that the "terms" of the 1928 Act are preserved as to appellants and that appellants therefore cannot sue WMATA. We are not reminded that the savings statute preserves liabilities "as they then existed" (here in 1982, the date of repeal), *see Keener v. Washington Metropolitan Area Transit Authority,* 255 U.S. App. D.C. 148, 800 F.2d 1173 (1986), *cert. denied,* 107 S.Ct. 1375 (1987), and therefore *before* the Supreme Court's 1984 decision in *Johnson* allegedly interpreting the 1928 Act. There is a certain incongruity in the majority's reasoning that the Congress cannot amend a statute no longer in existence but that the Supreme Court can interpret it. The truth of the matter is that the majority's analysis "creates" a small class of employees who have no judicial redress against general contractors.[18]

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[18] It is an interesting exercise to note that while we have held that the District of Columbia's legislative branch could effectively repeal the congressional 1928 Act, *see O'Connell, supra,* the majority holds today that we, as the District of Columbia's judicial branch, are required to follow an interpretation of the congressional 1928 Act, one repudiated by the Congress.

It is a little late in the game for the majority to plead that Congress intended the federal act and the local act to be interpreted identically. In the context of time, the majority's decision has the practical effect of reaching exactly the opposite result. Congress has spoken as to the meaning of §§ 4 and 5 of the LHWCA; general contractors do not possess immunity. The majority makes the local act comport not with Congress' understanding of §§ 4 and 5 of the LHWCA but rather with a Supreme Court decision stripped of any "precedential effect."

In short, I am convinced that the Supreme Court in *Johnson* did not interpret the local act. *Johnson* interpreted provisions of the federal act (and that interpretation has been rejected by Congress). If the majority is right, in suggesting that my reasoning constitutes an "end-run," and in holding that *Johnson* squarely presented and necessarily decided the local act, it is puzzling why *Johnson* makes no mention of the repeal of the local act or the savings statute. In my view, therefore, neither *Johnson* nor *Whalen* support the majority's reasoning today that *Johnson* rejected our interpretation of our decision in *DiNicola* as "inappropriate" and that we are prohibited from following *DiNicola*.

For these reasons, I would reverse the grant of summary judgment against the Esteps. I would hold that they might go to trial on their complaint against the general contractor, appellee Construction General, Inc., for negligence resulting in alleged permanent injuries suffered by Samuel Estep.

APPENDIX I

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 85-543

SAMUEL ESTEP, *et al.*,
Appellant,

v.

CONSTRUCTION GENERAL INCORPORATED, *et al.*
Appellee.

Before: MACK and FERREN, *Associate Judges*, and PAIR, *Senior Judge.*

ORDER

[Filed Mar. 11, 1986]

At oral argument on March 5, 1986, we indicated that supplemental briefing on specific questions would facilitate our further consideration of this case. The parties, having agreed to this proposal, are accordingly

ORDERED to file in this court within thirty (30) days from the date of this Order submissions addressing the following issues:

(1) Whether the decision of the United States Supreme Court in *WMATA v. Johnson*, 104 S.Ct. 2827 (1984), is irreconcilable with the decision of the District of Columbia Court of Appeals in *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979)?

(2) Whether Congress, by enacting the District of Columbia Court Reform and Criminal Procedure Act

of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970) (codified as amended at D.C. Code, title 11 (1981 and Supp.1985)), as amended, the District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended in scattered sections of D.C. Code (1981 & Supp.1985)), as amended, or both of these Acts, vested the District of Columbia Court of Appeals with jurisdiction on local issues equivalent for all purposes to that of the highest court of a state?

(3) Whether Congress, by enacting the District of Columbia Workmen's Compensation Act of 1928, ch. 612, § 1, 45 Stat. 600 (1928) (codified at D.C. Code §§ 36-501 to -502 (1973)), was acting on a national or federal level or, alternatively, was acting under U.S. Const. art. I, § 8, cl. 17 in a manner which was purely local in purpose and effect?

It is

FURTHER ORDERED that the Clerk's Office shall serve a copy of this Order upon the Corporation Counsel of the District of Columbia to enable that office to respond in whatever manner it deems appropriate.

PER CURIAM.

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APPENDIX J

RELEVANT STATUTES

Section 4 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 904 (1982)) provided:

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.
>
> (b) Compensation shall be payable irrespective of fault as a cause for the injury.

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 905 (1982)) provided, in part:

> (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all the liability of such employer to the employees, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law . . . on account of such injury or death . . . .

Section 4 of the District of Columbia Workers' Compensation Act of 1979 (D.C. Code Ann. § 36-303 (1981)) provides, in part:

> (b) Every employer subject to this chapter shall be liable for compensation for injury or death without regard to locality of injury or to fault as a cause of the injury or death.
>
> (c) In the case of an employer who is a subcontractor, the contractor shall be liable for and shall

secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

Section 5 of the District of Columbia Workers' Compensation Act of 1979 (D.C. Code Ann. § 36-304 (1981)) provides, in part:

> (a) The liability of an employer prescribed in § 36-303 shall be exclusive and in place of all liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law on account of such injury or death.
>
> (b) The compensation to which an employee is entitled under this chapter shall constitute the employees' exclusive remedy against the employer . . . .

Section 4 of the Longshoremen's and Harbor Workers' Compensation Act as amended by Congress in 1984 (33 U.S.C. § 904 (Supp. IV 1986)) now provides:

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.
>
> (b) Compensation shall be payable irrespective of fault as a cause for the injury.

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act as amended by Congress in 1984 (33 U.S.C. § 905 (Supp. IV 1986)) now provides, in part:

> (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law . . . on account of such injury or death . . . . For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

Title 28 United States Code § 1257 (1982) provided, in part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.
>
> For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Title 28 United States Code Annotated § 1257 (Supp. 3 Oct. 1988), effective for judgments entered after September 27, 1988, provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ

of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.